(23,093)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1912.

## No. 577.

L. P. BARNHILL, PLAINTIFF IN ERROR,

vs.

THE STATE OF ARKANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

INDEX.



JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 3, 1912.

1 *Caption.*

Pleas before Hon. J. W. Driver, Regular Judge of Greene Circuit Court, on December 5, 1911.

No. 735.

STATE OF ARKANSAS, Plaintiff,

—.

L. P. BARNHILL, Defendant.

Prosecution for Failure to Secure Peddler's License.

2 *Information.*

In the Justice of the Peace Court of Clark Township, Greene County, Arkansas.

Before J. W. Thompson, J. P.

*Information.*

Comes Jeff Bratton Deputy Prosecuting Attorney of Greene County, Arkansas, and states to the Court that he has reasons to believe that L. P. Barnhill did in the State of Arkansas and County of Greene on or about the 15th day of October, 1911, commit the crime of peddling or selling buggies and carriages in Greene County, without having first paid the license or privilege tax as required by law, and prays a warrant of arrest from J. W. Thompson a Justice of the Peace that said L. P. Barnhill may be arrested and brought before said Justice to be dealt with according to law.

JEFF BRATTON,
*Deputy Prosecuting Attorney.*

3 In the Justice of the Peace Court of Clark Township.

Before J. W. Thompson, J. P.

STATE OF ARKANSAS
vs.
L. P. BARNHILL.

*Trial & Judgment, J. P. Court.*

On *October* the 21st day of October 1911 comes Jeff Bratton Deputy Prosecuting Attorney and files before me information charging that L. P. Barnhill did in the County of Greene and State of Arkansas on or about the 15th day of October 1911, commit the

crime of traveling over Greene County, Arkansas, and selling or peddling buggies without license: Whereupon a warrant of arrest was issued and placed in the hands of the Constable of Clark Township October the 21st, 1911: On this day comes the defendant in charge of the said Constable and not being ready for trial of this cause trial was set for Oct. 24th and it was ordered that the defendant enter into a $500.00 bond for his appearance.

This cause is continued by consent and set for October the 27th at ten o'clock.

J. W. THOMPSON, *J. P.*

October the 27th this cause coming on for trial the defendant appeared in person and the State appeared by Jeff Bratton Deputy Prosecuting Attorney, all parties announce ready for trial, the defendant entered a plea of not guilty. The Court sitting as a jury heard all the evidence and the law and found the defendant guilty and assessed his fine at Two Hundred Dollars, ($200.00), and all cost.

4 It is therefore by the court considered ordered and adjudged that the defendant L. P. Barnhill pay to the State of Arkansas for the use and benefit of Greene County a fine of Two Hundred Dollars and all cost and that he be remanded to the custody of the Constable of Greene County until said fine and cost is fully paid and upon his default of the payment of the same that he be imprisoned in the Greene County Jail until said fine and cost is fully paid at seventy-five cents per day.

Given under my hand October the 27th, 1911.

J. W. THOMPSON, *J. P.*

5 *Costs, J. P. Court.*

Accrued Cost.

| | |
|---|---|
| J. W. Thompson, J. P. | $3.80 |
| R. F. Clark, Constable | 3.45 |
| Jeff Bratton, Deputy Pros. Att'y | 10.00 |

STATE OF ARKANSAS,
*County of Greene, Clark Township:*

I hereby certify that the above and foregoing is a true and perfect transcript of the proceedings together with all the papers in the above entitled case as shown by my docket.

Given under my hand this the 30th of October, 1911.

J. W. THOMPSON, *J. P.*

6 *Bail Bond, J. P. Court.*

Bail Bond.

STATE OF ARKANSAS,
*Greene County:*

L. P. Barnhill being in custody, charged with the offense of selling buggies without paying license and being permitted to give bail

in the sum of Five Hundred Dollars, now we hereby undertake that the above named L. P. Barnhill shall appear in the office of J. W. Thompson, Justice of the Peace, of Clark Township on the 24th day of its Oct. Term, 1911, to answer to said charge, and shall at all times render hisself amenable to the order and process of said Court in the prosecution of said charge, and if convicted shall render hisself in execution thereof or if he fails to perform either of these conditions, that we will pay the State of Arkansas the sum of $500.00 *Dollars.*

L. P. BARNHILL. [SEAL.]
W. O. LANE. [SEAL.]

7 *Affidavit for Appeal from J. P. Court.*

In the Justice Court of Clark Township, Greene County, Arkansas.

Before J. W. Thompson, J. P.

STATE OF ARKANSAS, Plaintiff,
vs.
L. P. BARNHILL, Defendant.

*Affidavit for Appeal.*

Comes L. P. Barnhill and represents to the Court that he is aggrieved by the judgment rendered herein against him in favor of the plaintiff, State of Arkansas, and prays an appeal therefrom to the Circuit Court.

L. P. BARNHILL.

L. P. Barnhill states on oath that the appeal in this cause is not taken for the purpose of delay, but that justice may be done.

L. P. BARNHILL.

Subscribed and sworn to before me, this 27th day of October, 1911.

J. W. THOMPSON, *J. P.*

8 In the Justice Court, Clark Township, Greene County, Arkansas.

Before J. W. Thompson, Justice of the Peace.

STATE OF ARKANSAS, Plaintiff,
vs.
L. P. BARNHILL, Defendant.

*Appeal Bond to Circuit Court.*

The defendant, L. P. Barnhill, having appealed from a judgment rendered against him by J. W. Thompson, Justice of the Peace of Clark Township, Greene County, Arkansas, on the 27th day of Oc-

tober, for a fine or Tow Hundred Dollars and costs, upon a charge of misdemeanor in selling vehicles without license, as provided for by Act No. 97, Acts of 1909 of Arkansas.

Now, Therefore, We acknowledge ourselves indebted to the State of Arkansas in the sum of Two Hundred and fifty Dollars conditioned that the defendant L. P. Barnhill shall appear in the Greene Circuit Court at the next December 1911 term, and submit himself to the jurisdiction thereof, and not depart therefrom without leave of said Court.

Given under our hands this 27th day of October, 1911.

L. P. BARNHILL.
W. O. LANE.

"Filed October 30, 1911.
J. P. CATHEY,
*Circuit Clerk.*"

9 *Bill of Exceptions.*

In the Greene Circuit Court, Second Division, December Term, 1911.

STATE OF ARKANSAS, Plaintiff,
vs.
L. P. BARNHILL, Defendant.

*Bill of Exceptions.*

Be It Remembered, That on the 4th day of December, 1911, a regular day of the March term of the Greene Circuit Court, Second Division, this cause came on for hearing before the Honorable W. J. Driver, Circuit Judge presiding, and a jury having been waived, the following proceedings were had to-wit: the case was submitted on the following agreed statement of facts:

10 *Agreed Statement of Facts.*

Greene Circuit Court, Second Division, Greene County, Arkansas.

STATE OF ARKANSAS, Plaintiff,
vs.
L. P. BARNHILL, Defendant.

*Agreed Statement of Facts.*

It is agreed that this cause may be submitted to the Court upon the following agreed statement of facts:

The Spaulding Manufacturing Company is a copartnership composed of H. W. Spaulding, F. E. Spaulding and E. H. Spaulding, all of whom are citizens and residents of Grinnell, Iowa, at which place is located the general office of the company and the factory in which are manufactured the vehicles and wagons which they sell

through traveling salesmen throughout Arkansas and other States in the Union. They have no factory at any other place than Grinnell, Iowa, and no regular place of business or branch house in the State of Arkansas. The manner in which the Spaulding Manufacturing Company had been a long time prior to, and at the time of this alleged offense, doing business in this State, is as follows:

The Company has and maintains at Memphis, Tenn., in car-load lots stored in a wareroom, carriages, buggies and vehicles of different grades and kinds manufactured by them, which is in charge of an agent of this company. It also has a division superintendent or manager by the name of Will Warren, in charge of its salesmen in Greene County, Arkansas, and other counties in Arkansas. It also has in its employ a certain number of salesmen who travel
11 over and through the county or counties in this State assigned to them, going from place to place taking orders and making contracts for the sale of vehicles, and among them is the defendant, L. P. Barnhill, a part of whose territory assigned to him by the company being Greene County, Arkansas. Within the last twelve months and only recently the defendant, Barnhill, has been traveling over and through Greene County, going from place to place therein, soliciting orders and taking orders and notes for buggies from residents of said county. Each salesman is furnished with one or more sample buggies, with which he travels over and through the county assigned to him, soliciting orders. In no case does the salesman sell the sample, and no sample has been sold or delivered by said defendant, Barnhill, nor does he solicit orders for the sale of such samples. Upon giving an order for a vehicle, the purchaser signs a note or memorandum of purchase, a blank form and copy of which is hereto attached, marked "Exhibit A", stipulating for the delivery of said vehicle within a certain number of days, usually thirty. The purchaser also delivers to the salesman at the time the order is made his note for the purchase price of such buggy or vehicle. A copy of said form of note is hereto attached as "Exhibit B" to this agreed statement of facts, both of which exhibits are hereby made a part hereof. All orders are transmitted by the salesman to their respective division superintendents, in this instance the orders obtained by Barnhill being transmitted by him to the said Warren. It is then the duty of the division superintendent to pass upon the financial responsibility of those giving the orders. If said orders are by the said Warren approved, he then directs the representative of the company at Memphis to make delivery *on* the same. The delivery is made as follows:

12 The vehicles designated in the orders are selected by the company's agent in charge from the stock on hand according to the respective styles mentioned in the contracts, and in sufficient numbers according to the styles sold as shown by the order, to supply those contracted for in any given community at any one interval and are placed on board a car at Memphis, the wheels and shaft being first taken off of the body of the vehicle. The body of the vehicle is tagged with the name of the respective purchaser, the wheels or shaft bearing no tag or name of the purchaser, being also

loaded into the same car and being capable of identification with the body of which they are a part by reason of the fact that they are suited for and a part of the buggy mentioned in the contract or purchase. The shipment is consigned to the order of the Spaulding Manufacturing Company, at a place near where the vehicles are to be delivered—in this instance at Jonesboro, Craighead County, Arkansas. A representative of the Spaulding Manufacturing Company, called a deliveryman, receives from the Railroad Company at Jonesboro the vehicles there consigned to his order. No storage house is maintained at that point, the method of business being to unload the vehicles, to attach to the body of the vehicle the wheels and shafts belonging and of the grade and kind sold, which requires only a few moments to the vehicle. The vehicles are then delivered directly by the company's deliveryman to their respective purchasers. The deliveryman is usually a different person from the salesman taking the order.

In accordance with this method and character of doing business, L. P. Barnhill, the defendant, as an agent of the company, on the — days of September, 1911, traveled over and through Greene
13 County, Arkansas, from place to place and took orders from William Ridge, Mrs. Harris, Chas. Hooker in Greene County, Arkansas, for vehicles, having each of these to sign the usual order and note in manner and form as above described, which said order was approved by the proper agent of the Spaulding Manufacturing Company. The vehicles have been delivered on said orders.

The above is a statement of the course of business pursued by the defendant, L. P. Barnhill, in his employment as a traveling salesman of the Spaulding Manufacturing Company before and at the time of his arrest herein. It is further agreed that no vehicle or buggies, excepting the sameple herein mentioned, are brought or sent into the State of Arkansas or stored therein by the Spaulding Manufacturing Company or any of its agents, except for the purpose of delivery upon orders previously taken for them as above described, and that no vehicles or wagons are sold by said company or its agents, except upon an order taken for said vehicle or wagon prior to the time it is brought into the State of Arkansas.

It is further agreed that neither the Spaulding Manufacturing Company, L. P. Barnhill, nor any other salesman or deliveryman, either for themselves or for the Spaulding Manufacturing Company, engaged in the taking of orders and the delivery of vehicles have paid the license tax provided for by Act No. 97, approved April 1, 1909.

JEFF BRATTON,
*Attorney for State.*
MOORE, SMITH & MOORE,
*Attorneys for Defendant.*

(Here follow fac-similes of Exhibit A and Exhibit B, marked page 14.)

Exhibit B.

Taken by..... Salesman

Form 90-10-21-'11-5M

Postoffice .....
Co. of ..... State of .....
Lives ..... Miles North Lives ..... Miles East
Lives ..... Miles South Lives ..... Miles West

Comp. Notes { No. ..... $ ..... Due .....
No. ..... $ ..... Due .....

$..... .....191.....

*On or before the* .....*day of* .....*191*....., *for value received,*

.....*I promise to pay to* **SPAULDING MFG. CO.**, *or order, at Grinnell, Iowa*

..... *Dollars*

WITH EXCHANGE AND COLLECTION CHARGES

*with interest at 8 per cent per annum, from date until due and at the rate of 10 per cent after due, and a reasonable attorney's fee if placed with attorney for collection or suit. If this note is not paid when due, companion Notes or Notes of even date herewith shall become immediately due and payable.*

This Note .....is given for one SPAULDING MFG. CO.'S vehicle No. .....for which I have this day given them an order and this note is to be void only upon the condition that SPAULDING MFG. CO. refuse to deliver said vehicle.

I own in my own name .....Acres of Land, in the County of .....State of .....
which at a fair valuation is worth $.....on which there are no encumbrances except .....for $..... I also own $.....worth of personal property over and above all exemptions and debts. There is no judgment against me. I make this statement at time of signing this Note for the purpose of obtaining credit, and it is understood that the ownership of the vehicle for which this Note is given shall not pass from SPAULDING Mfg. Co., until fully paid for. No salesman has authority to make any agreement not upon the face of this Note when made.

*Due* .....

*Witness* .....

*S. M. Co.'s No.* .....

Send For Coll.....

Write obscure names at end

Exhibit "A"

**MEMORANDUM OF AGREEMENT**
**With SPAULDING MFG. CO., of Grinnell, Iowa** ..... 191....

*Having examined and tested to my satisfaction samples of your line of Vehicles, I hereby purchase from you, subject to your approval on the terms herein mentioned, one of your* ..... *seat* .....
(One or Two) (End or Side Spring Buggy, Carriage or Spring Wagon)

*with* ..... *Top, with* ..... *known as Catalogue No.* ..... ..... *to be delivered at* .....
(Full Leather or Union) (Pole or Shafts)

..... *within 30 days from date of this Order, or as soon after as transportation will permit. This Memorandum is also a receipt for my note* ..... *of even date herewith, with interest at 8% from date of delivery, given as follows:*

**This MEMORANDUM contains all Agreements made with your Salesman. This Sale and Order are not subject to change or countermand.**

**Note for $** ..... **due** ..... **191....**

**Note for $** ..... **due** ..... **191....**

..... *Witness* **Signed** .....

..... *Salesman* .....

FORM 9-20-11-20-'11—20

15 This is all the evidence introduced by either party in the case.

Thereupon the defendant asked the court to find the facts as follows:

16 *Finding of Fact.*

1. The court finds that the defendant was engaged as agent of the Spaulding Manufacturing Company in taking orders for articles of commerce moving between the States of Tennessee and Arkansas, and that the character of the vehicles, as articles of commerce between the States, was not changed from the time the orders were taken to the time of delivery to the purchaser.

17 The court refused to give said finding of facts requested by the defendant, to which refusal the defendant at the time excepted and had his exceptions noted of record.

Whereupon, the defendant asked the court to declare the law as follows:

18 *Declarations of Law.*

1. That Act No. 97 of the Legislature of Arkansas, approved April 1, 1909, as applied to the business conducted by the defendant for the Spaulding Manufacturing Company as their agent, is in violation of Section 8 Article 1 of the Constitution of the United States, and in so far as it does apply is void.

2. That the said Act No. 97 denies to citizens of other States all the privileges and immunities granted to citizens of Arkansas, and is void because violative of Section 2, Article 4 of the Constitution of the United States.

3. That the said Act No. 97 denies to persons within its jurisdiction the equal protection of the laws, and is void because violative of the Fourteenth Amendment to the Constitution of the United States, and of Section 18, Article 2 of the Constitution of Arkansas.

4. That the tax or fee imposed by the said Act No. 97 upon each and every person engaged in each county in the State in the sale of the articles enumerated in the act as a privilege of selling said articles is excessive, and if considered as an act for the purpose of licensing and taxing for regulation is void on its face.

5. That said Act No. 97 was designated to regulate peddling and that the business as conducted by the Spaulding Manufacturing Company, through its salesmen, of which the defendant is one, is not peddling, and the defendant has not committed an offense.

19 The court refused to give each and every one of the above declarations of law, numbered 1, 2, 3, 4 and 5, respectively, which were separately requested by the defendant, and the defendant at the time severally and separately excepted to the refusal of the court to give each of the said declarations of law and had its exceptions severally and separately noted of record to the refusal of the court to give each of the said declarations of law.

And the court, of its own motion, found the facts as set forth in the agreed statement of facts, and upon the same found the defendant guilty and imposed a fine of $200.00, to which judgment of the court the defendant at the time excepted and had his exceptions noted of record.

On the same day the defendant filed his motion for a new trial, which is as follows:

20 *Motion for New Trial.*

Comes the defendant and moves the court to grant him a new trial herein, and for cause says:

First. The Court erred in refusing to find the facts as requested by the defendant as follows:

"The Court finds that the defendant was engaged as agent of the Spaulding Manufacturing Company in taking orders for articles of commerce moving between the States of Tennessee and Arkansas, and that the character of the vehicles as articles of commerce between the States was not changed from the time the orders were taken to the time of delivery to the purchasers".

Second. The Court erred in refusing declaration of law No. 1, requested by the defendant.

Third. The Court erred in refusing declaration of law No. 2, as requested by the defendant.

Fourth. The Court erred in refusing declaration of law No. 3, asked by the defendant.

Fifth. The Court erred in refusing declaration of law No. 4, as requested by the defendant.

Sixth. The Court erred in refusing declaration of law No. 5, as requested by the defendant.

Seventh. The judgment of the court is not sustained by the evidence as set out in the agreed statement of facts.

Eighth. The judgment of the court is contrary to the law.

Ninth. The judgment of the court is contrary to the law and to the evidence.

Wherefore, Defendant prays for a new trial and all other and proper relief.

21 And the said motion having been heard by and submitted to the court, was by the court overruled, to which ruling of the court the defendant at the time excepted and had his exceptions noted of record, and prayed an appeal to the Supreme Court, which was granted, and the defendant was given twenty days in which to file his bill of exceptions.

Wherefore, Defendant now presents this, his bill of exceptions, and asks that the same be signed by the judge in order that it may be filed and made a part of the records in this cause, which is accordingly done, this the 4th day of December, 1911.

W. J. DRIVER,
*Circuit Judge of the Greene Circuit Court, Second Division.*

22 *Judgment, etc.*

Criminal Court Record, Second Day December Term, 1911, December 5, 1911.

No. 735.

STATE OF ARKANSAS, Plaintiff,
vs.
L. P. BARNHILL, Defendant.

Now on this day comes the State of Arkansas by its attorney; comes also defendant, L. P. Barnhill, by his attorney, and on motion by consent of both parties a jury is waived and this cause submitted to the court sitting as a jury upon the agreed statement of facts herein filed. And the case being submitted upon the said agreed statement of facts the court doth find the facts as set out herein. The court further finds the defendant guilty as charged herein and fixes his punishment at a fine of Two Hundred Dollars. It is therefore ordered, considered and adjudged by the court that the State of Arkansas have and recover of and from the defendant L. P. Barnhill, the sum of Two Hundred Dollars fine, together with all costs herein expended, to which fine and judgment of the court the defendant excepts and asked that his exceptions be noted of record, which is accordingly done. Whereupon, defendant on this day, by his attorney, files his motion for a new trial of this cause, which motion is argued before and submitted to the court, and which is by the court overruled; to which ruling of the court defendant excepts and asked that his exceptions be noted of record, which is accordingly done; and defendant prays an appeal to the Supreme Court of Arkansas, which appeal is by the court granted; and it is ordered by the court that the defendant be allowed twenty
23 days in which to file his bill of exceptions herein.

It is further ordered by the court that the defendant be permitted to enter into bond in the sum of $500.00 *dollars* pending said appeal.

Record 6, page 517.

24 *Appeal Bond to Supreme Court.*

Greene Circuit Court, Second Division.

STATE OF ARKANSAS, Plaintiff,
vs.
L. P. BARNHILL, Defendant.

*Appeal Bond.*

The defendant, L. P. Barnhill, having prayed and been granted an appeal to the Supreme Court, from the judgment of the Greene

Circuit Court, Second Division, rendered herein against him at its December term, 1911, for a fine of $250.00 *Dollars* and costs, and being permitted to give bond in the sum of $500.00 *Dollars;* now we covenant to and with the plaintiff, the State of Arkansas, that said defendant, upon a final termination of his appeal, will appear and surrender himself in the Greene Circuit Court; or if he fails to do so, that we will pay to the said plaintiff the said sum of $500.00 *Dollars.*

Witness our hands and seals the 5th day of December, 1911.

L. P. BARNHILL,
Per WILL WARREN.
PARAGOULD TRUST CO. [SEAL.]
By A. BERTIG, *Vice Prest.*
H. W. TRIEBER.

25 *Cost Bill.*

No. 735.

STATE OF ARKANSAS
vs.
L. P. BARNHILL.

| | |
|---|---|
| J. W. Thompson, J. P. | $3.80 |
| R. F. Clark, Constable | 3.40 |
| Jeff Bratton, Deputy Pros. Att'y | 10.00 |
| J. P. Cathey, Clerk | 2.90 |
| J. E. Lawson, Sheriff | .30 |
| T. H. Caraway, Pros. Att'y | 10.00 |
| Fine | 200.00 |
| Conviction Tax | 3.00 |
| J. P. Cathey, Transcript | 5.75 |

*Certificate.*

STATE OF ARKANSAS,
*County of Greene:*

I, J. P. Cathey, Clerk of the Circuit Court within and for the County and State aforesaid, do hereby certify that the annexed and foregoing 21 pages of typewritten matter contains a true and perfect transcript of the files and record entries in the case of State of Arkansas vs. L. P. Barnhill, as shown by the records and files in this office.

Witness my hand and seal of said court this January 3, 1912.

[SEAL.] J. P. CATHEY, *Clerk.*

26 *Filing in Supreme Court.*

No. 1647.

L. P. BARNHILL, Appellant,
vs.
THE STATE OF ARKANSAS.

Greene.

W. J. Driver, J.

*Transcript.*

Filed January 5, 1911.
P. D. ENGLISH, *Clerk.*
By W. P. SADLER, *D. C.*

27 *Record Entries.*

STATE OF ARKANSAS,
*In the Supreme Court:*

Be It Remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 27th day, being the fourth Monday of November, A. D. 1911, at the Court house, in the City of Little Rock, the following proceedings were had, to-wit: On the 15th day of January, 1912, a day of said term:

No. 1646.

P. L. ROGERS, Appellant,
vs.
THE STATE OF ARKANSAS, Appellee.

Appeal from Greene Circuit Court.

and

No. 1647.

L. P. BARNHILL, Appellant,
vs.
THE STATE OF ARKANSAS, Appellee.

Appeal from Greene Circuit Court.

On motion and for cause shown, the appellants in the two causes above last named, are by the Court permitted to abstract and brief the said causes together.

28 STATE OF ARKANSAS,
*In the Supreme Court:*

Be It Remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 27th day, being the fourth Monday of November, A. D. 1911, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 29th day of January, 1912, a day of said term:

L. P. BARNHILL, Appellant,
VS.
THE STATE OF ARKANSAS, Appellee.

Appeal from Greene Circuit Court.

This cause being regularly called, come the parties thereto by their attorneys, and said cause is submitted upon the transcript of the record and the briefs filed, and by the Court taken under advisement.

29 *Judgment Supreme Court.*

STATE OF ARKANSAS,
*In the Supreme Court:*

Be It Remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 27th day, being the fourth Monday of November, A. D. 1911, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 12th day of February, 1912, a day of said term:

L. P. BARNHILL, Appellant,
VS.
THE STATE OF ARKANSAS, Appellee.

Appeal from Greene Circuit Court.

This cause came on to be heard upon the transcript of the record of the Circuit Court of Greene County, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said Circuit Court in this cause.

It is therefore considered by the Court that the judgment of said Circuit Court in this cause rendered be, and the same is hereby, in all things, affirmed with costs, and that unless said appellant shall, within fifteen juridical days, surrender himself to the proper authority in execution of said judgment, his bond be declared as forfeited.

It is further considered that said appellee recover of said appellant all her costs in this Court in this cause expended, and have execution thereof.

30 *Statement of Facts.*

No. 166.

In the Supreme Court of Arkansas, February 12, 1912.

ROGERS and BARNHILL
v.
STATE.

*Statement by the Court.*

These are two appeals prosecuted by the two defendants from judgments of conviction had upon separate trials. The facts and questions involved in the two cases are the same, and for that reason the appeals are considered together. The prosecutions were instituted before a justice of the peace upon separate informations charging the defendants with a violation of the peddling statute approved April 1st, 1909, which provides that "Before any person, either as owner, manufacturer or agent, shall travel over and through any county and peddle and sell any lightning rod, steel stove range, clock, pump, buggy, carriage or other vehicle, or either of said articles, he shall procure a license", etc. Acts 1909, p. 292. The trials before the justice of the peace and in the circuit court, to which appeals had been taken, resulted in the conviction of the defendants. The cases were heard upon an agreed statement of facts, which is as follows:

"The Spaulding Manufacturing Company is a copartnership composed of H. W. Spaulding, F. E. Spaulding, and E. H. Spaulding, all of whom are citizens and residents of Grinnell, Iowa, at which place is located the general office of the company and the factory, in which are manufactured the vehicles and wagons which they sell through traveling salesmen throughout Arkansas and other States in the Union. They have no factory at any other place than Grinnell, Iowa, and
31 no regular place of business or branch house in the State of Arkansas. The manner in which the Spaulding Manufacturing Company had been a long time prior to and at the time of this alleged offense, doing business in this State, is as follows:

The company has, and maintains, at Memphis, Tennessee, in carload lots stored in a wareroom, carriages, buggies and vehicles of different grades and kinds manufactured by them, which are in charge of an agent of the company. It also has a division superintendent, or manager, by the name of Will Warren, in charge of its salesmen in Greene County, Arkansas, and other counties in Arkansas. It also has in its employ a certain number of salesmen who travel over and through the counties in this State assigned to them going from place to place, taking orders and making contracts for the sale of vehicles, and among them is the defendant, Rogers, a part of whose territory assigned to him by the company being

Greene County, Arkansas. Within the last 12 months and only recently, the defendant, Rogers, has been traveling over and through Greene County, going from place to place therein, soliciting and taking orders and notes for buggies from residents of said county. Each salesman is furnished with one or more sample buggies, with which he travels over and through the county assigned to him, soliciting orders. In no case does the salesman sell the sample, and no sample has been sold or delivered by said defendant Rogers, nor does he solicit orders for the sale of such samples. Upon giving an order for a vehicle, the purchaser signs a note or memorandum of purchase, a blank form and copy of which is hereto attached, marked exhibit "A", stipulating for the delivery of said vehicle within a certain number of days, usually 30. The purchaser also delivers to the salesman at the time the order is made, his
32 note for the purchase price of such buggy or vehicle. A copy of said note is hereto attached as exhibit "B" to this agreed statement of facts, both of which exhibits are hereby made a part hereof. All orders are transmitted by the salesmen to their respective division superintendents, in this instance, the orders obtained by Rogers being transmitted by him to the said Warren. It is then the duty of the division superintendent to pass upon the financial responsibility of those giving the orders. If the said orders are by the said Warren approved, he then directs the representative of the company at Memphis, to make delivery on the same. The delivery is made as follows:

The vehicles designated in the orders are selected by the company's agent in charge from the stock on hand according to the respective style mentioned in the contracts, and in sufficient numbers according to the styles sold, as shown by the orders, to supply those contracted for in any given community at any one interval, and are placed on board a car at Memphis, the wheels and shafts being first taken off of the body of the vehicle. The body of the vehicle is tagged with the name of its respective purchaser, the wheels or shafts bearing no tag or name of the purchaser, being also loaded into the same car, and capable of identification with the body of which they are a part, by reason of the fact that they are suited for and a part of the buggy mentioned in the contract of purchase. The shipment is consigned to the order of the Spaulding Manufacturing Company at a place near where the vehicles are to be delivered, in this instance, at Jonesboro, Craighead County, Arkansas. A representative of the Spaulding Manufacturing Company, called a deliveryman, receives from the railroad Com-
33 pany at Jonesboro, the vehicles there consigned to his order. No storehouse is maintained at that point, the method of business being to unload the vehicles, to attach to the body of each vehicle the wheels and the shafts belonging to, and of the grade and kind sold, which requires only a few moments to the vehicle. The vehicles are then delivered directly by the company's deliveryman to their respective purchasers. The deliveryman is usually a different person from the salesman taking the order.

In accordance with this method and character of doing business,

P. L. Rogers, the defendant, as an agent of the company on the — days of September, 1911, traveled over and through Greene County, Arkansas, from place to place, and took orders from Wm. Ridge, Mrs. Harris, and C. Hooker, in Greene County, Arkansas, having each of these to sign the usual order and note in manner and form as above described, which said orders were approved by the proper agent of the Spaulding Manufacturing Company. The vehicles have been delivered on said orders."

It was further agreed that no vehicle except the samples above mentioned were brought into the State or stored therein except for the purpose of delivery upon orders previously taken, and that no vehicle was sold except upon such order taken for the vehicle prior to the time it was brought into the State. It was further agreed that neither of the defendants nor their employer, had taken out the license prescribed by the act.

## *Opinion.*

FRAUENTHAL, J. (after stating the facts):

The facts of these cases are identical in every essential particular, except one, with the facts of the case of Crenshaw v. State, 95 Ark. 464, in which a prosecution for the violation of this 34 statute was considered and a conviction thereunder sustained. The particular in which these cases apparently differ from the Crenshaw case is that in the case at bar the vehicles were separately tagged with the names of the respective purchasers at the time they were placed on board the cars at Memphis, Tennessee. The vehicles, however, were loaded and transported in one shipment and consigned to the Spaulding Manufacturing Co. at Jonesboro, where they were unloaded and thereafter delivered to the purchasers who, only after inspection and acceptance, received them. In the Crenshaw case, the ranges were not tagged or noted with the names of the purchasers at the time they were delivered to the common carrier at St. Louis.

We do not think that the tagging of the vehicles with the names of the persons executing orders therefor under the facts adduced in these cases, distinguishes them from the Crenshaw case in any particular that would declare the evidence in these cases lacking in any ingredient essential to constitute a violation of this statute, or that it would make the shipment a subject matter of interstate commerce any more than the shipment involved in the Crenshaw case. The gist of the offense created by this statute does not consist in making sales without license but in peddling without license. As is held in the case of Crenshaw v. State, supra, in order to constitute peddling there must be the element of traveling from place to place, over and through the county, for the purpose of making sales. The statute does not declare it an offense to make sales, nor does it seek to impose a license fee or tax on sales, but only makes it an offense for one to go about from place to place, from residence to residence, in and through the county in the prosecution of a wayfaring busi-

ness, without procuring license whether in making sales
35 or in taking orders. As was said relative to a statute quite similar to this by the Supreme Court of the United States, "Its object in requiring peddlers to take out and pay for licenses and to exhibit their licenses on demand to any peace officer or to any citizen householder of the county, appear to have been to protect the citizens of the State against the cheats and frauds and even thefts which, as the experience of ages has shown, are likely to attend itinerant and irresponsible peddling from place to place and from door to door". Emert v. Missouri, 156 U. S. 296. This statute is directed at an itinerant occupation which may endanger the peace and safety of the citizens of the State and not at a business which only involves the sale of property. It is but the exercise of the police power of the State and, as was said in the above case of Emert v. Missouri, supra, "It is no wise repugnant to the power of Congress to regulate commerce among the several States but is a valid exercise of the power of the State over persons in business within its borders."

The question as to the place at which the sale was made and at which the title to the property passed is not essentially different in these cases from that involved in the Crenshaw case; because in these cases it was provided in the orders given by the prospective purchasers of the vehicles that they were purchased in effect upon condition that when the vehicles were delivered to them in Greene County they should be approved by them after an inspection and acceptance thereof. So that the sales were not really consummated until the purchasers actually had inspected and accepted the vehicles in Greene County. The mere fact that the vehicles were tagged in the names of the prospective purchasers when the shipment was made at Memphis did not change the character of the act
36 committed by these defendants, which consisted in going from house to house and residence to residence throughout the county in taking the orders and, thus, in peddling. It is true that in the case of Crenshaw v. State, supra, the case of Rearick v. Pa. 203 U. S. 507, is referred to, and this court stated that the facts in that case differed from the Crenshaw case in that the ranges in the Crenshaw case were not tagged with the names of the purchasers. But the court did not base its opinion in that case upon the ground that the ranges were not tagged in the names of the purchasers or that the Rearick case was decisive in event the ranges had been so tagged. It based its decision upon the ground that the act of peddling prohibited by this statute without license consisted in going about from place to place, over and through the county, for the purpose of making sales; that the statute regulating such acts was but the exercise of the police power of the State in protecting its citizens; that it in no wise affected interstate commerce or any business or thing which was the subject matter of interstate commerce. We are of the opinion that the facts in the cases at bar are, in every essential particular, analogous to those in the Crenshaw case. In the Crenshaw case the constitutionality of this peddling statute, under similar facts and conditions, was upheld and we see no reason for changing that decision.

It has been held by the Supreme Court of the United States that State statutes requiring that notes otherwise negotiable instruments, the consideration for which is a patent right or patented article, should be executed in a prescribed manner or otherwise be invalid as negotiable paper or even void, are not in contravention of any provision of the Federal Constitution or of any power given
37 to Congress to legislate relative to the subject matter of such transactions. This ruling is based upon the ground that such State legislation is but the exercise of the police power of the State in the protection of its citizens against fraud and imposition which common experience has shown can be more readily perpetrated in cases where the sale of patent rights and patented articles is the subject matter of the transaction. Allen v. Riley, 203 U. S. 347; Woods v. Carl, 203 U. S. 358; Ozan Lumber Co. v. Union Co. Bank, 207 U. S. 251.

In the latter case it is said: "The various itinerant venders of patented articles, whose fluency of speech and carelessness regarding the truth of their representations might almost be said to have become proverbial, were of course in the mind of the legislature and were included in this legislation. Indeed they are the principal people to be affected by it".

In the latter case the transaction involved a contract of sale concerning a matter which was the subject of interstate commerce and while the question as to whether or not such State Legislation relative to patent notes was affected by reason of the fact that the patented article sold was shipped in interstate commerce was not expressly passed on in the opinion rendered by the Federal Supreme Court, it does not appear to have met the attention of the United States Circuit Court of Appeals in that case and is there noted. Union Co. Bank v. Ozan Lumber Co. 179 Fed. 710. But in those cases this character of legislation is recognized as a valid police regulation enacted by the State for the peace and security of its citizens. The peddling statute of this State we think is that character of legislation and is for that reason valid.

The judgments are accordingly affirmed.

Wood, J., dissents.

38 *Clerk's Certificate.*

SUPREME COURT,
*State of Arkansas, ss:*

I, Peyton D. English, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of L. P. Barnhill, Appellant, vs. The State of Arkansas, Appellee, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this March 8, 1912.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH,
*Clerk Supreme Court of Arkansas.*

39 *Assignment of Errors, etc.*

Supreme Court of Arkansas.

No. 1647.

L. P. BARNHILL, Appellant,
vs.
THE STATE OF ARKANSAS, Appellee.

*Assignment of Errors and Prayer for Reversal.*

Now comes the above appellant and files herewith his petition for a writ of error and says that there are errors in the records and proceedings in the above entitled case, and for the purpose of having the same reviewed in the United States Supreme Court makes the following assignment:

The Supreme Court of Arkansas erred in holding that a certain Act of the General Assembly of the State of Arkansas, known as Act No. 97 of the Acts of 1909 of the General Assembly of Arkansas, approved April 1, 1909 (Laws of 1909, page 292,) was constitutional and valid. The validity of said Act was denied and drawn in question by appellant on the ground of its being repugnant to the Constitution of the United States, and in contravention thereof. The said errors are more particularly set forth as follows:

The Supreme Court of Arkansas erred in holding and deciding:

First, that said Act was not void as applied to the business conducted by the appellant as being a regulation of interstate commerce in contravention of Article 1, section 8, of the Constitution of the United States.

Second, that said Act does not abridge the privileges and immunities of the citizens of the several states in contravention of Article 4, section 2, of the Constitution of the United States.

Third, that said Act does not deny to appellant and other persons within its jurisdiction the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States.

40 Fourth, that said Act does not deprive citizens of life, liberty or property, without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States;

For which errors the appellant, L. P. Barnhill, prays that the said judgment of the Supreme Court of the State of Arkansas, dated February 12, 1912, be reversed, and a judgment rendered in favor of the appellant, and for costs.

ARTHUR C. LYON,
MOORE, SMITH & MOORE,
*Attorneys for Appellant.*

Filed March 7, 1912.
P. D. ENGLISH,
*Clerk Sup. Court.*

41 *Petition for Writ of Error.*

Supreme Court of Arkansas.

No. 1647.

L. P. BARNHILL, Appellant,
vs.
STATE OF ARKANSAS, Appellee.

*Petition for Writ of Error.*

Considering himself aggrieved by the final decision of the Supreme Court in rendering judgment against him in the above entitled case, the appellant hereby prays a writ of error from the said decision and judgment to the United States Supreme Court, and an order fixing the amount of a supersedeas bond.

Assignment of errors herewith.

ARTHUR C. LYON,
MOORE, SMITH & MOORE,
*Attorneys for Appellant.*

STATE OF ARKANSAS,
*Supreme Court, ss:*

Let the writ of error issue upon the execution of a bond by L. P. Barnhill to the State of Arkansas, in the sum of $500.00; such bond, when approved, to act as a supersedeas.

Dated March 7, 1912.

EDGAR A. McCULLOCH,
*Chief Justice Supreme Court of Arkansas.*

Filed March 7, 1912.
P. D. ENGLISH,
*Clerk Sup. Court.*

42 *Bond.*

Copy.

L. P. BARNHILL, Plaintiff in Error,
vs.
STATE OF ARKANSAS, Defendant in Error.

*Bond.*

Know all men by these presents: That we, L. P. Barnhill, as principal, and The United States Fidelity and Guaranty Company, as sureties, are held and firmly bound unto the State of Arkansas in the sum of Five Hundred Dollars, to be paid to the said State, to

which payment well and truly to be made we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 7th day of March, 1912.

Whereas, The above named plaintiff in error seeks to prosecute his writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Arkansas;

Now, Therefore, The condition of this obligation is such, that if the above named plaintiff in error shall prosecute his said writ of error to effect, and answer all costs and damages that may be adjudged if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

L. P. BARNHILL.

[SEAL.] THE UNITED STATES FIDELITY & GUARANTY CO.,

By C. P. PERRIE,
J. F. LOUGHBOROUGH,
*Attorneys in Fact.*

Bond approved and to operate as a supersedeas.
Dated March 7, 1912.

EDGAR A. McCULLOCH,
*Chief Justice Supreme Court of Arkansas.*

Filed March 7, 1912.
P. D. ENGLISH,
*Cl'k Sup. Court.*

43 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before your, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between L. P. Barnhill and the State of Arkansas, wherein was drawn in question the validity of a statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute,

or commission; a manifest error hath happened, to the great damage of the said L. P. Barnhill, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and pro-
44 ceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglas White, Chief Justice of the United States, the 7 day of March, in the year of our Lord one thousand nine hundred and twelve.

[The Seal of the District Court of East. Dist. Ark., Western Division, U. S. A.]

SID. B. REDDING,
*Clerk District Court of the United States for the Eastern District of Arkansas.*
By W. P. FEILD, JR., *D. C.*

Allowed March 7, 1912.
EDGAR A. McCULLOCH,
*Chief Justice Supreme Court of Arkansas.*

Filed March 7, 1912.
P. D. ENGLISH,
*Clerk Sup. Court.*

45 *Certificate of Lodgement.*

SUPREME COURT,
*State of Arkansas, ss:*

I, Peyton D. English, clerk of the said court, do hereby certify that there was lodged with me as such clerk on March 7, 1912, in the matter of L. P. Barnhill, versus The State of Arkansas.

1. The original bond of which a copy is herein set forth.
2. Two copies of the writ of error, as herein set forth, one for each defendant, and one to file in my office.
3. Two copies of the assignment of errors and prayer for reversal.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this March 8, 1912.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH,
*Clerk Supreme Court of Arkansas.*

46 *Citation.*

THE UNITED STATES OF AMERICA, ss:

The President of the United States to the State of Arkansas, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Arkansas, wherein L. P. Barnhill is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Arkansas this 7 day of March, 1912.

EDGAR A. McCULLOCH,
*Chief Justice Supreme Court of Arkansas.*

Attest:

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH,
*Clerk of the Supreme Court of Arkansas.*

LITTLE ROCK, ARK., *March 7th*, 1912.

I, attorney of record for the defendant in error in the above entitled case, hereby acknowledge service of the above citation, and enter an appearance in the Supreme Court of the United States.

HAL L. NORWOOD,
*Attorney General.*

Filed March 7, 1912.
P. D. ENGLISH,
*Clk Sup. Court.*

47 *Return to Writ.*

UNITED STATES OF AMERICA,
*Supreme Court of Arkansas:*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Arkansas, in the City of Little Rock, this March 8, 1912.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH,
*Clerk Supreme Court of Arkansas.*

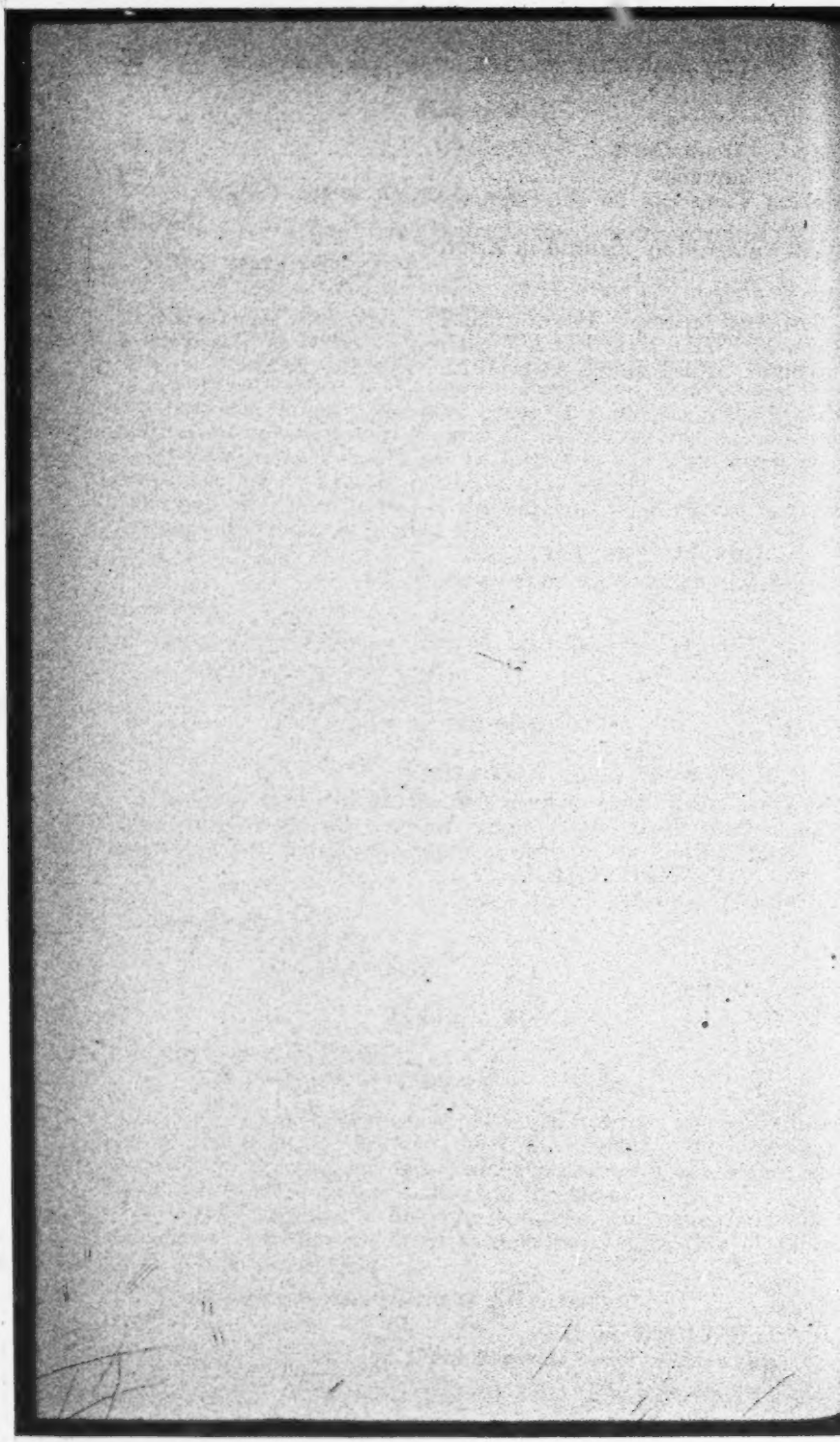
*Costs of Suit.*

| | |
|---|---|
| Costs in Circuit Court | 33.40 |
| " " Supreme " | 37.00 |
| Making Transcript for the Supreme Court of the United States | $14.00 |

All costs paid by Plaintiff in Error.

P. D. ENGLISH, *Clerk.*

Endorsed on cover: File No. 23,093. Arkansas Supreme Court. Term No. 577. L. P. Barnhill, plaintiff in error, vs. The State of Arkansas. Filed March 14th, 1912. File No. 23,093.



3



# MOTION TO ADVANCE

## SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1912

## No. 576

P. L. ROGERS, PLAINTIFF IN ERROR,

vs.

STATE OF ARKANSAS, DEFENDANT IN ERROR.

## No. 577

L. P. BARNHILL, PLAINTIFF IN ERROR,

vs.

STATE OF ARKANSAS, DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Arkansas.

A. C. LYON, COUNSEL FOR PLAINTIFFS IN ERROR.

# SUPREME COURT OF THE ULITED STATES

**OCTOBER TERM, 1912.**

## No. 576

P. L. ROGERS, PLAINTIFF IN ERROR,

vs.

STATE OF ARKANSAS, DEFENDANT IN ERROR.

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## No. 577

L. P. BARNHILL, PLAINTIFF IN ERROR,

vs.

STATE OF ARKANSAS, DEFENDANT IN ERROR.

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**MOTION TO ADVANCE.**

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The plaintiff in error in the above entitled causes, moves to advance said cases so that they may be set down for argument and be heard immediately following the cases of A. C. Crenshaw, Plaintiff in Error, vs. State of Arkansas, and E. L. Gannaway, Plaintiff in Error, vs. State of Arkansas, Nos. 127 and 128 respectively, October Term, 1912, on the ground that all of said cases involve the construction and the constitutionality of identically the same statute of Arkansas, under somewhat different statements of fact in each case.

(Signed) A. C. LYON,

Counsel for Plaintiff in Error, In Nos. 576 and 577, October Term, 1912.

We consent to the foregoing motion.

(Signed) HAL L. NORWOOD, Attorney General,

Counsel for Defendant in Error, In Nos. 576 and 577, October Term, 1912.

The foregoing motion is made pursuant to Rule 26 on the ground that the business of the Court will be greatly expedited and the convenience of the litigants in these cases will be best served by the granting of the motion. Identically the same statute of Arkansas is involved in each case. The statute is known as Act 97 of the 1909 Acts of Arkansas, published on pages 292 and 293 of the 1909 Acts of Arkansas. The statute involved is, in full, as follows:

"ACT 97.

AN ACT to regulate the sale of Lightning Rods, Steel Stove Ranges, Clocks, Pumps, Buggies, Carriages and Vehicles in the several counties of this state.

SECTION

1. License required for privilege of peddling lightning rods, steel stove ranges, clocks, pumps, buggies, carriages and vehicles.
2. County clerk to issue license on payment of two hundred dollars to the county treasurer.
3. Failure to procure license a misdemeanor; penalty therefor.
4. Definition of the term "Peddler."
5. Laws in conflict repealed; Act in force from passage.

**BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:**

SECTION 1. That hereafter before any person, either as owner, manufacturer or agent, shall travel over and through any county and peddle or sell any lightning rod, steel stove range, clock, pump, buggy, carriage or other vehicle or either of said articles, he shall procure a license as hereinafter provided from the County Clerk of such County, authorizing such person to conduct such business.

SECTION 2. That before any person shall travel over or through any County and peddle or sell any of the articles mentioned above, he shall pay into the County Treasury of such County the sum of Two Hundred ($200.00) Dollars, taking the receipt of the Treasurer therefor, which receipt shall state

for what purpose the money was paid. The County Clerk of such County upon the presentation of such receipt shall take up the same and issue to such person a certificate or license, authorizing such person to travel over such County and sell such articles or article for a period of one year from the first day of January preceding the date of such license.

SECTION 3. Any person who shall travel over or through any county in this State and peddle or sell, or offer to peddle or sell any of the above enumerated articles without first procuring the license herein provided for shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than two hundred ($200.00) dollars nor more than five hundred ($500.00) dollars.

SECTION 4. That any person who shall travel over or through any County in this State and peddle or sell any of the articles mentioned above, shall be deemed and held to be a peddler, under the provisions of this Act.

SECTION 5. All laws and parts of laws in conflict with this Act are hereby repealed and this Act shall take effect and be in force from and after its passage.

Approved April 1, 1909."

The cases of A. C. Crenshaw, Plaintiff in Error vs. State of Arkansas, and E. L. Gannaway, Plaintiff in Error vs. State of Arkansas, No. 127 and No. 128 respectively, October Term, 1912, come much earlier on the docket and will, of course, be considered in their regular order. The cases of P. L. Rogers, Plaintiff in Error, vs. State of Arkansas, and L. P. Barnhill, Plaintiff in Error, vs. State of Arkansas, No. 576 and No. 577 respectively, October Term, 1912, can well be considered and disposed of immediately following the submission of the Crenshaw and Gannaway cases. The construction, interpretation and validity of the same statute of Arkansas is involved in all these cases, but there are, of course, differences and variations in the facts of each case. It is believed that the time of this Court will be greatly promoted if all these cases which raise somewhat similar questions under identically the same statute, can be heard and determined one after the other.

Considering the interests of all parties litigant in these cases, and considering the desire of this Court to avoid unnecessary duplication in the briefing and arguing of the various cases on its docket, it is

submitted that the present motion should be granted as it would contribute to the best interests of all the parties and this Court as well.

Counsel for Defendant in Error in these cases, consents to this motion.

(Signed) A. C. LYON,

Counsel for Plaintiff in Error in No. 576 and No. 577, October Term, 1912.

# INDEX.

## SUBJECT INDEX.



## LIST OF CASES REFERRED TO.

## STATEMENT.

1909, Acts of Arkansas, page 292, Act 97, reads in full as follows:

### "Act 97.

AN ACT to regulate the sale of Lightning Rods, Steel Stove Ranges, Clocks, Pumps, Buggies, Carriages and Vehicles in the several counties of this state.

SECTION

1. License required for privilege of peddling lightning rods, steel stove ranges, clocks, pumps, buggies, carriages and vehicles.
2. County clerk to issue license on payment of two hundred dollars to the county treasurer.
3. Failure to procure license a misdemeanor; penalty therefor.
4. Definition of the term "Peddler."
5. Laws in conflict repealed; Act in force from passage.

*Be It Enacted by the General Assembly of the State of Arkansas:*

SECTION 1. That hereafter before any person, either as owner, manufacturer or agent, shall travel over and through any county and peddle or sell any lightning rod, steel stove range, clock, pump, buggy, carriage or other vehicle or either of said articles he shall procure a license as hereinafter provided from the County Clerk of such County, authorizing such person to conduct such business.

SECTION 2. That before any person shall travel over or through any County and peddle or sell any of the articles mentioned above, he shall pay into the County Treasury of

such County the sum of Two Hundred ($200.00) Dollars, taking the receipt of the Treasurer therefor, which receipt shall state for what purpose the money was paid. The County Clerk of such County upon the presentation of such receipt shall take up the same and issue to such person a certificate or license, authorizing such person to travel over such County and sell such articles or article for a period of one year from the first day of January preceding the date of such license

SECTION 3. Any person who shall travel over or through any county in this State and peddle or sell, or offer to peddle or sell any of the above enumerated articles without first procuring the license herein provided for shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than two hundred ($200.00) dollars nor more than five hundred ($500.00) dollars.

SECTION 4. That any person who shall travel over or through any County in this State and peddle or sell any of the articles mentioned above, shall be deemed and held to be a peddler, under the provisions of this Act.

SECTION 5. All laws and parts of laws in conflict with this Act are hereby repealed and this Act shall take effect and be in force from and after its passage.

Approved April 1, 1909."

Plaintiff in Error is a salesman or canvasser employed by Spaulding Manufacturing Company, a co-partnership composed of H. W. Spaulding, F. E. Spaulding and E. H. Spaulding all of whom are citizens and residents of Grinnell, Iowa. They have no permanent or fixed place of business within the state of Arkansas. They are engaged in the manufacture and sale of buggies and automobiles. Their factory and principal place of business is located in Grinnell, Poweshiek County, Iowa, and they sell the entire product of

their factory directly to users or consumers throughout the United States. The Spaulding Manufacturing Company sent a force of salesmen or canvassers in charge of a superintendent into Greene County, Arkansas and adjoining counties. These salesmen or canvassers went about through the country showing their samples and taking orders for the future delivery of buggies like the samples, from those customers who desired to buy. They did not at any time sell their samples or offer them for sale. (Rec. p. 5.) Upon receiving an order for a buggy, the salesman turned it over to his superintendent, who looked up the financial responsibility of the customer, and if found satisfactory, the order was sent to a representative of the Spaulding Manufacturing Company in Memphis, Tennessee, who had charge of a warehouse there at which the company maintained vehicles of different kinds and grades in carload lots. When sufficient orders thus taken had accumulated, a carload of vehicles was loaded at Memphis, Tennessee, and shipped to some point in Arkansas nearest the residences of the customers, each vehicle being tagged with the name and address of the customer. (Rec. p. 6.) The vehicles were consigned to the company, and were received at destination by a separate agent called a deliveryman, who unloaded them and delivered them directly to the customers at their residences, in pursuance with their orders. No vehicle was shipped into the state of Arkansas except upon an order previously taken therefor in the above manner. (Rec. p. 6.)

Plaintiff in Error, one of the canvassers or salesmen, was arrested, charged with a violation of the provisions of the statute of Arkansas above set out. Upon his conviction by a Justice of the Peace, he appealed to the Circuit Court of Greene County where the case was heard by the court upon an agreed statement of facts without a jury. (Rec. p. 4.) The court on its own motion, found the facts as set out in the agreed statement (Rec. p. 8), and found the defendant be-

low guilty and imposed a fine of $200.00. Plaintiff in Error appealed to the Supreme Court of Arkansas where his conviction was affirmed and the statute declared to be constitutional and valid. *State vs. Rogers,* 144 S. W. 211. The case is now brought before this Court by writ of error to the Supreme Court of Arkansas.

## ERRORS RELIED ON.

The Supreme Court of Arkansas erred in holding that a certain Act of the General Assembly of the State of Arkansas, known as Act No. 97 of the Acts of 1909 of the General Assembly of Arkansas, approved April 1, 1909 (Laws of 1909, page 292), was constitutional and valid. The validity of said Act was denied and drawn in question by appellant on the ground of its being repugnant to the Constitution of the United States, and in contravention thereof. The said errors are more particularly set forth as follows:

The Supreme Court of Arkansas erred in holding and deciding:

First, that said Act was not void as applied to the business conducted by the appellant as being a regulation of interstate commerce in contravention of Article 1, Section 8, of the Constitution of the United States.

Second, that said Act does not abridge the privileges and immunities of the citizens of the several states in contravention of Article 4, section 2, of the Constitution of the United States.

Third, that said Act does not deny to appellant and other persons within its jurisdiction the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States.

Fourth, that said Act does not deprive citizens of life, liberty or property, without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

## BRIEF.

### I.

### Interstate Commerce.

The Arkansas statute, correctly construed, does not apply to an interstate commerce transaction such as the agreed statement of facts in this case shows. Plaintiff in Error was not engaged in peddling and his acts do not come within the scope of the Arkansas statute.

*Commonwealth vs. Farnum*, 114 Mass. 267;
*City of St. Paul vs. Briggs*, 85 Minn. 290, 88 N. W. 984;
*State vs. Moorhead*, 20 S. E. 544 (S. C.);
*Kansas vs. Collins*, 8 Pac. 865;
*City of Davenport vs. Rice*, 75 Iowa, 74; 39 N. W. 191;
*Spencer vs. Whiting*, 68 Iowa, 678; 28 N. W. 13;
*Potts vs. State of Texas*, 74 S. W. 31;
*State vs. Ivey*, 50 S. E. 428 (S. C.);
*Kennedy vs. People*, 9 Colo. App. 290; 49 Pac. 373;
*Hewson vs. Englewood*, 27 Atl. 904 (N. J.);
*State vs. Franks*, 130 N. C. 724; 41 S. E. 485;
*Wausaw vs. Heideman*, 96 N. W. 549 (Wis.);
*Cerro Gordo vs. Rawlings*, 135 Ill. 36; 25 N. E. 1006;
*Village of Stamford vs. Fisher*, 140 N. Y. 187; 35 N. E. 500;
*State vs. Wells*, 45 Atl. 143; 60 N. H. 424;
*Kimmel vs. City of Americus*, 105 Ga. 694; 31 S. E. 623;
*Clements vs. Town of Casper*, 4 Wyo. 494; 35 Pac. 472;
*City of Brookfield vs. Kitchen*, 163 Mo. 546; 63 S. W. 825;
*Pegues vs. Ray*, 50 La. Ann. 574;
*Hynes vs. Briggs*, 41 Fed. 468;
*In re Kimmel*, 41 Fed. 775;
*In re Spain*, 47 Fed. 208;
*In re Houston*, 47 Fed. 539;
*In re Flynn*, 57 Fed. 496;

*Chicago Portrait Co. vs. City of Macon*, 147 Fed. 967;
*State vs. Gruber*, 133 N. W. 571 (Minn.);
*Clark vs. State*, 59 So. 236 (Ala.).

The Arkansas Supreme Court, however, in *Crenshaw vs. Arkansas*, 130 S. W. 569 and *Rogers vs. Arkansas*, 144 S. W. 211, have construed the statute to apply to strict interstate commerce transactions. Whether correctly construed or not, we assume that this does not raise a federal question, and that this court will follow the interpretation of the Arkansas Supreme Court.

Plaintiff in Error was engaged in interstate commerce:

*Gloucester Ferry Co. vs. Pennsylvania*, 114 U. S. 196, (203);
*Addyston Pipe Co. vs. U. S.*, 175 U. S. 211 (241);
*Kidd vs. Pearson*, 128 U. S. 1. (20);
*Robbins vs Shelby Taxing District*, 120 U. S. 489. (497);
*Asher vs. Texas*, 128 U. S. 129;
*Leisy vs. Hardin*, 135 U. S. 100;
*Brennan vs. Titusville*, 153 U. S. 287;
*Stockard vs. Morgan*, 185 U. S. 27;
*Caldwell vs. N. C.*, 187 U. S. 622;
*Rearick vs. Pennslyvania*, 203 U. S. 507;
*Dozier vs. Alabama*, 218 U. S. 124.

The Arkansas statute attempts to regulate and impose a burden upon interstate commerce, and is, therefore, unconstitutional and void.

## II.

### Privileges and Immunities.

The act of Arkansas under consideration in its effect and operation, practically applies only to non-residents of the state of Arkansas, and hence abridges the privileges and immunities of the citizens of the several states and is, therefore,

invalid. U. S. Census Reports show that none of the articles named are manufactured to any great extent, if at all, in the state of Arkansas. Taxing those who peddle or sell these articles, therefore, imposes a burden upon non-resident manufacturers who must furnish all the necessary supply and limits and prescribes the methods by which they can sell their product in Arkansas. Statutes in which such a discrimination or any discrimination against non-residents results from express terms, are plainly unconstitutional.

*Ward vs. Maryland*, 97 U. S. (12 Wall.) 418;
*Welton vs. Missouri*, 91 U. S. 275;
*Guy vs. Baltimore*, 100 U. S. 434;
*Webber vs. Virginia*, 103 U. S. 344.

Statutes which have the effect and operation of discriminating against the citizens of outside states, are equally as invalid and unconstitutional, as those which expressly so discriminate.

*Utah vs. Bayer*, 97 Pac. 129;
*Oregon vs. Wright*, 100 Pac. 296;
*Smith vs. Farr*, 104 Pac. 401 (Colo.);
*Minnesota vs. Barber*, 136 U. S. 313;
*Brimmer vs. Rebman*, 138 U. S. 78;
*Robbins vs. Shelby Taxing Dist.*, 120 U. S. 489.

## III.

### Due Process of Law.

The act of Arkansas is prohibitive and confiscatory, and deprives persons of life, liberty or property without due process of law, and hence is unconstitutional and invalid. The statute is intended to destroy and annihilate the business covered by its terms.

*In re McCoy*, 101 Pac. 419 (Calif.);
*The Laundry License Case*, 22 Fed. 701;
*Postal Telegraph Cable Co. vs. Taylor*, 192 U. S. 64;
*Cache County vs. Jensen*, 21 Utah, 207; 61 Pac. 306;

*Spaulding vs. Evenson*, 149 Fed. 913;
*Utah vs. Bayer*, 97 Pac. 129;
*Smith vs. Farr*, 104 Pac. 401. (Colo.);
*Iowa City vs. Glassman*, 136 N. W. 899 (Ia.);
*Carrollton vs. Bazzette*, 159 Ill. 284, 42 N. E. 847;
*People vs. Jenkins*, 94 N. E. 1065 (N. Y.);
1 Tiedman State and Federal Control, 505.

## IV.

### Equal Protection of the Laws.

Chapter 97 of the 1909 Laws of Arkansas unreasonably discriminates between persons who are substantially in the same position and creates an arbitrary classification, and, therefore, denies the equal protection of the laws to those against whom it discriminates and is in contravention of the Fourteenth Amendment to the U. S. Constitution, and therefore, void.

*Oregon vs. Wright*, 100 Pac. 296;
*Utah vs. Bayer*, 97 Pac. 129;
*Smith vs. Farr*, 104 Pac. 401 (Colo.);
*Ex parte Jones*, 43 S. W. 513 (Texas);
*State vs. Wagener*, 72 N. W. 67 (Minn.);
*Spokane vs. Macho*, 98 Pac. 755 (Wash.);
*Jackson vs. State*, 117 S. W. 818 (Texas);
*State vs. Gardner*, 51 N. E. 136 (Ohio);
*State vs. Justus*, 97 N. W. 124 (Minn.);
*State vs. Smith*, 84 Pac. 851 (Wash.);
*Henry vs. Campbell*, 67 S. E. 390 (Ga.);
*State vs. Miksicek*, 125 S. W. 507 (Mo.);
*People vs. Wilber*, 90 N. E. 1140 (N. Y.);
*In re Van Horne*, 70 Atl. 986 (N. J.);
*Tacoma vs. Krech*, 46 Pac. 255 (Wash.);
*Denver vs. Bach*, 58 Pac. 1089 (Colo.);
*Seaboard etc. Railway vs. Simon*, 47 So. 1001 (Fla.);
*State vs. Ashbrook*, 55 S. W. 627 (Mo.);
*Gulf etc. Railway vs. Ellis*, 165 U. S. 150;
*Connelly vs. Union Sewer Pipe Co.*, 184 U. S. 540;
*In re Grice*, 79 Fed. 627;
*Cotting vs. Kansas City Stock Yards Co.*, 183 U. S. 79.

## V.

### Statute is A Trade Measure.

Act 97 of the 1909 Laws of Arkansas is a type of similar laws enacted previously in Arkansas and in many other states. All of these laws of this type, including the Arkansas law under consideration, are trade laws pure and simple. They are not passed in a *bona fide* attempt to exert the police power of the state to remedy a public evil. As a matter of common knowledge, they are passed at the instance and request of a certain kind or class of dealers or traders in order to build up and strengthen their own business, and to keep out the competition of those whose business would interfere with their own.

*People vs. Ringe*, 90 N. E. 451 (N. Y.);
*State vs. Rice*, 80 Atl. 1026 (Md.);
*Wyeth vs. Cambridge*, 86 N. E. 925 (Mass.);
*Great Atlantic & Pacific Tea Co. vs. Tippecanoe*, 96 N. E. 1092 (Ohio);
*People vs. Jenkins*, 94 N. E. 1065 (N. Y.);
*Jewel Tea Co. vs. Lee's Summit*, 189 Fed. 280;
*State vs. Smith*, 84 Pac. 851 (Wash.);
*State vs. Ashbrook*, 55 S. W. 627 (Mo.);
*People vs. Marx*, 2 N. E. 29 (N. Y.);
*People vs. Gilson*, 17 N. E. 343 (N. Y.);
*Lochner vs. New York*, 198 U. S. 45;
*Robbins vs. Shelby Taxing District*, 120 U. S. 489;
*Caldwell vs. North Carolina*, 187 U. S. 622;
*Denver Jobbers Ass'n vs. People*, 122 Pac. 404 (Colo.);
*Oregon vs. Wright*, 100 Pac. 296;
*Smith vs. Farr*, 104 Pac. 401 (Colo.);
*Utah vs. Bayer*, 97 Pac. 129;
*Ex parte Deeds*, 75 Arkansas, 542;
*Ex parte Eaglesfield*, 180 Fed. 558;
*Potts vs. State*, 74 S. W. 31 (Tex.);
*Spaulding vs. Evenson*, 149 Fed. 913;
*In re Kinyon*, 75 Pac. 268;

*In re Jarvis*, 71 Pac. 576 (Kans.);
*State vs. Wagener*, 72 N. W. 67 (Minn.);
*State vs. Parr*, 123 N. W. 408 (Minn);
*Bacon vs. Locke*, 83 Pac. 721 (Wash.);
*Stratton vs. State*, 137 N. W. 903 (Nebr.);
*State vs. Garbroski*, 111 Iowa, 296.

## ARGUMENT.

### I.

### Interstate Commerce.

It was seriously contended in the various courts of Arkansas in the present case that the acts admitted to have been done by the plaintiff in error, did not constitute a violation of Act 97 of the 1909 Laws of Arkansas; that the business of a solicitor, canvasser, or drummer, is not prohibited by the Arkansas law and does not come within the evils which that statute is designed to prevent or regulate. It was strongly urged that the expressions in the statute "peddle or sell" were synonymous terms and that the law intended only to reach those who actually did peddle or sell *as a peddler;* that there was no reason to believe that the Legislature intended to enlarge the statutory definition of a peddler, or to include any acts within its terms, that did not come within the ordinary and usual definition of that term. It was urged that the terms "peddle" or "peddler" are terms of fixed significance in the law and that they cannot be changed by arbitrary enactment. It was pointed out that many Federal Courts and the Supreme Courts of nearly every state in the Union had held that canvassers or solicitors or drummers did not come within the purpose or language of ordinances or statutes having for their purpose the regulation of peddling. Among others, the following cases show the great weight of authority which was submitted on this proposition.

*Commonwealth vs. Farnum*, 114 Mass. 267;
*City of St. Paul vs. Briggs*, 85 Minn. 290; 88 N. W. 984;
*State vs. Moorhead*, 20 S. E. 544 (S. C.);
*Kansas vs. Collins*, 8 Pac. 865;
*City of Davenport vs. Rice*, 75 Iowa, 74; 39 N. W. 191;
*Spencer vs. Whiting*, 68 Iowa, 678; 28 N. W. 13;
*Potts vs. State of Texas*, 74 S. W. 31;
*State vs. Ivey*, 50 S. E. 428 (S. C.);
*Kennedy vs. People*, 9 Colo. App. 290; 49 Pac. 373;
*Hewson vs. Englewood*, 27 Atl. 904 (N. J.);
*State vs Franks*, 130 N. C. 724; 41 S. E. 485;
*Wausaw vs. Heideman*, 96 N. W. 549 (Wis.);
*Cerro Gordo vs. Rawlings*, 135 Ill. 36; 25 N. E. 1006;
*Village of Stamford vs. Fisher*, 140 N. Y. 187; 35 N. E. 500;
*State vs. Wells*, 45 Atl. 143; 60 N. H. 424;
*Kimmell vs. City of Americus*, 105 Ga. 694; 31 S. E. 623;
*Clements vs. Town of Casper*, 4 Wyo. 494; 35 Pac. 472;
*City of Brookfield vs. Kitchen*, 163 Mo. 546; 63 S. W. 825;
*Pegues vs. Ray*, 50 La. Ann., 574;
*Hynes vs. Briggs*, 41 Fed. 468;
*In re Kimmel*, 41 Fed. 775;
*In re Spain*, 47 Fed. 208;
*In re Houston*, 47 Fed. 539;
*In re Flynn*, 57 Fed. 496;
*Chicago Portrait Co. vs. City of Macon*, 147 Fed. 967.

The Arkansas courts in the present case were urged to adopt the construction of the statute which would make it apply only to peddling or intra state transactions. Other state courts have construed similar statutes as having no application to interstate commerce transactions.

*State vs. Gruber*, 133 N. W. 571 (Minn.);
*Clark vs. State*, 59 So. 236 (Ala.).

The Supreme Court of Arkansas, however, refused to limit the effect of the statute under consideration to peddling simply, and sustained its validity when applied to strict interstate transactions. See the decision in the present case, *Rogers vs. Arkansas*, 144 S. W. 211; also *Crenshaw vs. Arkansas*, 130 S. W. 569. Whether the Supreme Court of Arkansas rightly interpreted the Arkansas statute under consideration or not, we assume that this does not present a federal question, and that even though this Court believed that the Supreme Court of Arkansas was wrong in its interpretation of its own statute, this Court would be bound by the interpretation placed upon it by the Arkansas Supreme Court. Under the numerous decisions of this Court, the rule of practice has become fixed to adopt the interpretation placed upon a statute by the Supreme Court of the state in question. Our only purpose in presenting the question here at this time is to show that it was properly urged upon the Supreme Court of Arkansas and that the statute was deliberately construed by them to include the operations of any person who went about from place to place to peddle the prohibited goods or to sell them in any manner whatever, and that this interpretation includes the canvasser, the solicitor, the agent, the drummer, the salesman, or any form or manner of selling by any person who goes about from place to place attempting to do business in the sale of the prohibited articles.

It is, of course, conceded that Congress alone has the power to regulate interstate commerce and that the inaction of Congress on this subject is equivalent to a declaration that such commerce shall be free from any regulation. The determination of the present case under this head involves at least three considerations. First. What is interstate commerce? Second. Was plaintiff in error engaged in interstate commerce? Third. Does the Arkansas statute under consideration attempt to regulate or impose a burden upon interstate commerce?

The Supreme Court of Arkansas, in our view of it, either misconceived what is comprised or included in interstate commerce, or erroneously decided that plaintiff in error was not engaged in interstate commerce, or else concluded that the statute in question did not attempt to regulate or impose any burden upon such commerce. We will take up the consideration of these three elements in their order.

The decisions of the Supreme Court of the United States have been so numerous and so consistent that it seems almost superfluous to enter into a discussion at this late date of what constitutes interstate commerce. We will not attempt any lengthy discussion of this point, but will confine ourselves to a short review of a few of the statements in the decisions of the U. S. Supreme Court in which more or less comprehensive definitions of the term have been attempted. This Court in the case of *Gloucester Ferry Co. vs. Pennsylvania,* 114 U. S. 196, at page 203, says:

> "Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities."

The same language is quoted with approval by this Court in the case of *Addyston Pipe Co. vs. United States,* 175 U. S. 211 (241). In the case of *Kidd vs. Pearson,* 128 U. S. 1, at page 20, this Court said:

> "The legal definition of the term, as given by this Court in *County of Mobile vs. Kimball,* 102 U. S. 691 (702), is as follows: Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons, as well as the purchase, sale and exchange of commodities."

A short and simple statement of what constitutes interstate commerce, which is sufficient for the purposes of this case, is given by this Court in the case of *Robbins vs. Shelby Taxing District,* 120 U. S. 489, at page 497, as follows:

> "The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce."

It is unnecessary to multiply citations or quotations on this point in order to show that the conception of the term "interstate commerce" as outlined by this Court, is broad enough to include not only the actual shipment and transfer of goods from one state to another, but the preliminary negotiation necessary to effect sales of goods which are at the time in another state, and includes such preliminary negotiation, the actual transfer and the subsequent delivery of such goods in pursuance of such negotiations.

Was the plaintiff in error engaged in interstate commerce? The answer to this question requires a reference to the agreed statement of facts in this case, (Rec. p. 4), and a comparison of such facts with the facts in a large number of other cases which have been decided by this Court, to be included within the protection of the interstate commerce clause of the constitution. The agreed statement of facts, (Rec. p. 5), shows that plaintiff in error had one or more sample buggies with him and traveled over and through Greene County, Arkansas, soliciting orders for buggies like the sample exhibited. He did not at any time sell any of his samples or solicit orders for the sale of his samples. When a purchaser was found, he signed an order in the form set out as Exhibit "A", (Rec. opp. p. 6), and at the same time paid the purchase price in cash or gave his promissory notes therefor for a part or all of the agreed

price. This order, with others similarly taken by plaintiff in error, was turned over to his Superintendent who investigated the financial responsibility of the purchaser, and if found satisfactory, he sent the order, with others similarly taken to another agent of the same employer who was in charge of a storage warehouse of the employer in Memphis, Tennessee, who thereupon loaded a carload of buggies, appropriating to each purchaser a buggy corresponding to the style ordered by him, tagging each buggy with the name and address of the purchaser and consigned the whole shipment to the employer at a station near the residences of the purchasers where the buggies were received by the employer, unloaded, and delivered, usually by a separate employe called a deliveryman, to the respective purchasers at their residence. It appears, (Rec. p. 6), that no buggies, excepting samples, were brought or sent into the state of Arkansas by any of the agents of the employer except for the purpose of being delivered upon orders previously taken therefor, and that no buggy was sold or delivered by the employer, or its agents, in Arkansas except upon an order taken for said buggy prior to the time said buggy was brought or shipped into the state of Arkansas. (Rec. p. 6.) Does the course of dealing above described, come within the protection of the commerce clause of the U. S. constitution? Does the business above described, constitute interstate commerce, and as such, is it protected from the burdensome regulations imposed by the Arkansas statute under consideration? A reference to a few of the leading cases decided by this Court, will show that the course of dealing above described, constitutes interstate commerce in its strictest sense. In the case of *Robbins vs. Shelby Taxing District,* 120 U. S. 489, the facts showed that Robbins was engaged in soliciting trade by use of samples in Shelby County, Tennessee for his employers, who were located in Cincinnati, Ohio, and

in taking orders for future delivery for said employers. The Court held that he was engaged in interstate commerce, and, therefore, could not be subjected to any regulation or to the payment of any tax by the state of Tennessee for conducting such business.

See further, the case of *Asher vs. Texas,* 128 U. S. 129, where it appears that Asher was soliciting trade by the use of samples in Houston, Texas, for his employer, who was located in New Orleans, La. This Court held that the business in which he was engaged, was strictly interstate commerce and could not be subjected to burdensome taxation by the state of Texas.

See also *Leisy vs. Hardin,* 135 U. S. 100, in which the facts were that certain goods were shipped by citizens of Illinois into the state of Iowa in pursuance of orders previously taken therefor, and these goods were seized by the officers of the state of Iowa as having been sold in violation of the provisions of the Iowa statutes. This Court, in an exhaustive decision, held that such a course of business was plainly interstate commerce, and was protected from any state regulation which imposed a burden upon it.

See also *Brennan vs. Titusville,* 153 U. S. 289, in which a canvasser was arrested in Titusville, Pennsylvania, for soliciting orders for the future delivery of pictures for his employer located in Chicago, Ill. The orders were forwarded to his employer at Chicago, and the goods thereafter shipped to the purchaser in Pennsylvania. This Court held that an ordinance which levied a license upon the conduct of this business was void, as the business was strictly interstate commerce, and as such, beyond the regulation and control of any state laws or ordinances made under their authority.

See further the case of *Stockard vs. Morgan,* 185 U. S. 27, in which the complainant in Chattanooga, Tennessee,

was engaged in soliciting orders for goods for his non-resident principal, which orders were sent to the non-resident principal and the goods thereafter sent into Tennessee to the purchaser in pursuance of said orders. This Court held that the conduct of such a business was beyond the regulation and control of the state statutes, and that complainant was engaged in interstate commerce and hence could not be subjected to any tax therefor by state authority or agency.

To the same effect, see *Caldwell vs. North Carolina*, 187 U. S. 622, in which it appears that defendant was engaged in delivering certain pictures and frames which had been sent into Greensboro, North Carolina, in pursuance of orders previously taken therefor by other agents of the same non-resident principal, who resided in Chicago, Ill. It appears that the goods were consigned in large packages to the principal, and that the defendant opened the packages, removed the pictures, placing each in an appropriate frame, and delivered them to the prospective purchasers. This Court held that the transactions constituted strict interstate commerce, and could not be subjected to taxation by any statute of North Carolina, or ordinance of any city passed under such authority. This Court held that it was immaterial whether the goods were shipped into the state directly to the purchaser, or whether they were consigned to the principal, or the agent, and thereafter delivered to the purchaser.

See also *Rearick vs. Pennsylvania*, 203 U. S. 507, in which the facts disclosed that the defendant was engaged in soliciting orders for groceries in Sunbury, Pennsylvania, for his employer whose place of business was in Ohio. The goods were shipped into the state of Pennsylvania in pursuance of orders previously taken therefor, being consigned to the agent, but tagged or marked with the name of the customer, some goods, for example, brooms, being tied together in bundles,

wrapped up conveniently for shipment. This court held that interstate commerce does not depend upon any technicalities in the law of sales, and that the exact point where and when the title passes is not controlling, and that in this case, the defendant was engaged in strict interstate commerce, beyond the reach of any burden of taxes imposed by the state of Pennsylvania or any municipality thereof.

See further the case of *Dozier vs. Alabama*, 218 U. S. 124, which is the latest case involving questions similar to those in the present case. It appears that defendant was convicted under a statute prohibiting the soliciting of orders for the enlargement of photographs, or pictures, or picture frames of any character, or for their sale or disposal. The defendant solicited orders for pictures, etc., in the state of Alabama for his principal in Chicago, Ill. The orders were sent to Chicago, and the goods thereafter sent into the state of Alabama to the defendant to be delivered in appropriate frames to the purchasers. This Court held that the defendant was engaged in interstate commerce, not alone as to pictures, for which orders had been taken previous to their shipment into the state, but also as to the frames for which no definite orders had been taken but concerning which an agreement had been entered into by which the pictures were to be delivered in appropriate frames, which the purchaser could buy at factory prices, and that defendant could not be subjected to any license tax by the state of Alabama for the conduct of such business.

This long line of decisions, extending over a period covering the past thirty years, absolutely settles the law as to what constitutes interstate commerce. These decisions show that the definition of interstate commerce instead of being narrowed and restricted, is constantly being enlarged and extended.

It cannot be urged that interstate commerce is confined

or limited to sales made to storekeepers or to dealers or wholesalers. A transaction which involves a sale to an individual consumer, is as much interstate commerce as a sale similarly made to a dealer or storekeeper. It is absolutely immaterial whether the purchaser desires and expects to use or consume the article himself, or whether he hopes and expects to sell the article to some one else who, in turn, becomes a user or consumer. The use to which a purchaser desires to put the articles purchased, has no bearing whatever upon whether the transaction is interstate commerce or not. The purchaser's position or situation in respect to his place in any economic theory of distribution, is entirely immaterial in determining whether any particular transaction with him, is interstate commerce or not. Whether the seller or the buyer is a person, or firm, or a corporation, or whether either of them is a producer, a consumer, a jobber, a storekeeper, a merchant, or a dealer, can have no effect upon this proposition. It is sufficient to refer again to the cases of *Brennan vs. Titusville*, 153 U. S. 289, *Caldwell vs. North Carolina*, 187 U. S. 622, *Rearick vs. Pennsylvania*, 203 U. S. 507, and *Dozier vs. Alabama*, 218 U. S. 124, to show that interstate commerce is not confined to transactions with any particular person or class or persons whatever. In all of these cases, the purchaser was an ultimate consumer and the seller was seeking purchasers and negotiating for sales to individual buyers, and in each of these cases, this Court held the transaction to be strictly interstate commerce and as such protected by the United States constitution.

Does the Arkansas statute under consideration, impose a burden upon interstate commerce, or attempt to regulate it? There can be but one answer to this question. The agreed statement of facts in the present case, (Rec. p. 4), shows that the plaintiff in error was, in fact, engaged in interstate commerce and the judgment of the Supreme Court

of Arkansas denies him the right to engage in that commerce without paying therefor an enormous tax or license fee for the privilege. That such a statute, as thus interpreted and applied by the Supreme Court of Arkansas, does, in fact, lay a burden upon interstate commerce and attempt to regulate it even to the point of excluding it altogether, cannot admit of any question. We contend that the Arkansas statute is, in fact, prohibitive, and was intended to have exactly that effect. But whether the present statute is prohibitive or not, it is clear that it imposes a very substantial burden upon plaintiff in error for the privilege of engaging in a lawful business which the constitution of the United States and the decisions thereunder protect from such burdens. Even if the present statute does not exact a tax which is, in fact, prohibitive, should the present statute be sustained, there is nothing whatever to prevent the increase of the tax until that result is attained. If the right to tax interstate commerce exists at all in the state of Arkansas, there is no limit to the amount of the tax which may thus be imposed, and the state can at any time entirely prevent such commerce even if the present statute does not do so. In speaking of the method of extending a business into another state by the sending of salesmen to procure orders, this Court in *Robbins vs. Shelby Taxing District,* 120 U. S. 489, at page 495, says:

> "But how is the merchant or manufacturer to secure such orders? If he may be taxed by such states for doing so, who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden upon interstate commerce, is to speak at least unadvisedly and without due attention to the truth of things."

The Supreme Court of Arkansas in construing the statute, attempts to show that the Arkansas law does not re-

quire a license for taking orders for future delivery, or does not impose a tax on interstate commerce, but only imposes a tax on peddling. See *State vs. Byles,* 126 S. W. 94, where the Supreme Court of Arkansas says on page 97:

> "The Legislature has the power to select certain occupations and tax them without taxing others, and to classify the peddling of certain articles as an occupation and tax it."

See also *Crenshaw vs. State,* 130 S. W. 569, where the Supreme Court of Arkansas says, on page 570:

> "The statute is directed against peddling, and undertakes to define what constitutes peddling within the meaning of the statute. This definition varies from the common law definition of peddling in that it is not essential that the vendor deliver his wares at the time he makes sales thereof, in order to come within its terms. In the statutory definition, the words "peddle" and "sell" are used synonymously, but in order to come within the terms of the statute, it is essential that a sale must be made by one traveling over and through the county. The statute does not reach to mere sales. In other words, one who simply brings his wares into a county and sells them, does not fall within the statute. There must be added the element of traveling from place to place, over and through the county, for the purpose of selling, in order for the statute to reach it."

See also *Rogers vs. State,* 144 S. W. 211, where the Supreme Court of Arkansas says, on page 213:

> "The gist of the offense created by this statute, does not consist in making sales without license; but in peddling without license.

> As is held in the case of *Crenshaw vs. State, supra,* in order to constitute peddling, there must be the element of traveling from place to place, over and through the county for the purpose of making sales. The statute does not declare it an offense to make sales, nor does it seek to impose a license fee or tax on sales, but only makes it an offense for one to go about from place to place, from residence to residence, in and through the county in the prosecution of a wayfaring business, without procuring license, whether in making sales or in taking orders."

In the words of Chief Justice Marshall, "It is impossible to conceal from ourselves that this is varying the form without varying the substance." *Brown vs. Maryland,* 25 U. S. (12 Wheat.) 419 (444).

The above extracts from the various opinions of the Supreme Court of Arkansas in which they have construed the statute under consideration, make it plain that it is their belief that the Legislature of Arkansas can define the word "peddling" in any way they choose and can make it include any transactions whatever, irrespective of whether such transactions constitute peddling at common law or irrespective of whether the transactions constitute interstate commerce or not. In other words, the opinions of the Supreme Court of Arkansas assert that the business of peddling can be regulated by the state and that no matter what sort of transactions or negotiations a person is engaged in, he can be forced to pay a license or be subjected to the payment of a heavy fine or be branded as a criminal provided only that the Legislature of Arkansas has defined the term "peddling" so as to include his transactions or negotiations. We have never believed it possible that any state could circumvent the United States constitution by the mere device of a flexible or elastic definition. The language of

this Court in *Robbins vs. Shelby Taxing District* is applicable here. See 120 U. S. at page 496:

> "The mere calling the business of a drummer a privilege, cannot make it so. Can the State Legislature make it a Tennessee privilege to carry on a business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on interstate commerce? It seems to be forgotten, in argument, that the people of this country are citizens of the United States as well as of the individual states, and that they have some rights under the Constitution and laws of the former independent of the latter and free from any interference or restraint from them."

If a state is permitted by the mere device of definition to lay a burden on interstate commerce, our constitutional safe-guards amount to very little. See the language of the court in the case of *Haskell vs. Cowham,* 187 Fed. 403, on page 406:

> "And, if in this way that state can prevent interstate commerce in natural gas, it may, in the same way, prevent it in grain, in coal, in all manufactures, and in every other article of commerce, and the method so diligently sought for more than a century whereby a state may nullify the commercial clause of the constitution, has at last been discovered."

The truth is, that it makes no difference what definition is applied by the Legislature of Arkansas to the transactions of the plaintiff in error. If they were, in fact, interstate commerce, it makes no difference that the Legislature of Arkansas has made a definition which would include them within the term peddling. The truth is that no mat-

ter what the transactions are called or how they are defined; if they are interstate commerce, the state of Arkansas cannot regulate them or tax them or prohibit them.

It is difficult to see how it is possible to engage in interstate commerce at all with the citizens of the state of Arkansas in the articles named in this statute. The language of the statute prohibits, except under penalty, any person from going about from place to place within any county and peddling or selling any clocks, pumps, buggies, lightning rods, or stoves. This language has been held several times by the Supreme Court of Arkansas to apply to a strict interstate commerce transaction where the purchaser was an ultimate consumer. The language of the statute would apply equally as well to a sale similarly made to a merchant or storekeeper. The statute, therefore, if impartially enforced, would apply, not only to every sale made by a canvasser or solicitor to an individual purchaser, but would apply to every sale made by a canvasser or drummer to a merchant or storekeeper. We will show later that practically all of the prohibited articles are manufactured outside of the state of Arkansas and that being necessaries, they are in common and universal use among the people of Arkansas. The whole supply, therefore, must be furnished in some way by non-resident manufacturers. If the present statute of Arkansas is sustained as valid, it will be impossible for any non-resident manufacturer to introduce his goods into that state and sell them there. If the state of Arkansas can levy a burdensome tax or license fee upon every canvasser or drummer or salesman who goes about taking orders for the goods named in the statute, all traffic and business in these goods will be annihilated and destroyed. It is obvious that the only practical way for a non-resident manufacturer to introduce and sell his goods, is in some way to procure orders for them. Certainly if the state of

Arkansas can tax the procuring of these orders, they can stop the business entirely. Interstate Commerce, therefore, in these five harmless, necessary articles named in the statute, will be thus effectively prohibited. Again, the language of this Court in *Robbins vs. Shelby Taxing District* is particularly applicable. See 120 U. S. at page 494:

> "Do not such restrictions affect the very foundation of interstate trade? How is a manufacturer, or a merchant, of one state, to sell his goods in another state, without, in some way, obtaining orders therefor? Must he be compelled to send them at a venture, without knowing whether there is any demand for them? This may, undoubtedly, be safely done with regard to some products for which there is always a market and a demand, or where the course of trade has established a general and unlimited demand. A raiser of farm produce in New Jersey or Connecticut, or a manufacturer of leather or wooden ware, may, perhaps, safely take his goods to the city of New York and be sure of finding a stable and reliable market for them. But there are hundreds, perhaps thousands, of articles which no person would think of exporting to another state without first procuring an order for them. It is true, a merchant or manufacturer in one state may erect or hire a warehouse or store in another state, in which to place his goods, and await the chances of being able to sell them. But this would require a warehouse or a store in every state with which he might desire to trade. Surely, he cannot be compelled to take this inconvenient and expensive course. In certain branches of business, it may be adopted with advantage. Many manufacturers do open houses or places of business in other states than those in which they reside, and send their goods there to be kept on sale. But this is a matter of convenience, and not of

compulsion, and would neither suit the convenience nor be within the ability of many others engaged in the same kind of business, and would be entirely unsuited to many branches of business. In these cases, then, what shall the merchant or manufacturer do, who wishes to sell his goods in other states? Must he sit still in his factory or warehouse, and wait for the people of those states to come to him? This would be a silly and ruinous proceeding.

The only other way, and the one, perhaps, which most extensively prevails, is to obtain orders from persons residing or doing business in those other states. But how is the merchant or manufacturer to secure such orders? If he may be taxed by such states for doing so, who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden upon interstate commerce, is to speak at least unadvisedly and without due attention to the truth of things."

We submit that under the admitted facts in this case, the plaintiff in error was engaged strictly in interstate commerce and that the statute of Arkansas under consideration as interpreted by the Supreme Court of Arkansas, not only attempts to regulate it but lays a heavy burden upon it which will result in completely destroying it as to the five harmless, necessary articles named in the statute. It is, therefore, unconstitutional and invalid.

## II.

### Privileges and Immunities.

In reading over the Arkansas statute, one is at once struck by the peculiar list of articles, the sale of which the statute penalizes. The Act is declared in its title to be an "Act to regulate the sale of lightning rods, steel stove ranges,

clocks, pumps, buggies, carriages and vehicles in the several counties of this state." At the outset a perfectly natural inquiry arises as to why the sale of these articles needs regulation. What is there about them which demands a specific statute relating to them, or which makes it necessary that those who sell them should pay an exorbitant license fee or be branded as a criminal? Stoves, clocks, pumps, buggies and lightning rods are harmless and necessary articles in universal use among the citizens of Arkansas and every other state. Nothing whatever can be said against any of these articles as to any intrinsic injury which is liable to result to any citizen or to the public generally from their use. It is perfectly obvious that they are no more dangerous in their use and enjoyment than shot guns, bowie knives, revolvers, poisons or a thousand other articles whose sale is totally unrestricted by this or any other statutes of Arkansas. What then, is the purpose of the statute? A knowledge of trade and manufacturing conditions in Arkansas, makes the reason for the enactment of this statute reasonably plain. None of the articles named are manufactured to any great extent, if at all, within the State of Arkansas. Fortunately, this need not be left to conjecture or doubt. The United States government, through its Census of Manufacturers, enables us to prove our assertion. This Court will take judicial notice of all public government records generally; of the rules and regulations of the various executive departments of the government and of the official records and reports thereof. See:

*Jones vs. U. S.*, 137 U. S. 202, (214) and cases there cited;
*Heath vs. Wallace*, 138 U. S. 573, (584);
*Knight vs. U. S. Land Assn.*, 142 U. S. 161, (169);
*Jenkins vs. Collard*, 145 U. S. 546, (561);
*Caha vs. U. S.*, 152 U. S. 211, (221) and cases there cited;
*Quong Wing vs. Kirkendall*, 223 U. S. 59, (62).

By examining the U. S. Census reports, it can be definitely shown that our statement regarding the five articles enumerated in the Arkansas statute is well within the truth. The statute penalizes the sale of lightning rods, steel stove ranges, clocks, pumps and buggies, and we will take up each of these articles separately as to what the government reports show as to their place of manufacture.

### Lightning Rods.

The location of all factories in the United States making electrical appliances, apparatus or supplies, is given in Vol. VII, 1900 U. S. Census (Manufacturers Part 1) p. 182-3, and a careful examination of this report shows that no lightning rods whatever are manufactured within the State of Arkansas.

### Steel Stove Ranges.

Vol. VII, 1900 Census (Manufacturers Part 1), p. 254-261, shows the location of factories engaged in the manufacture of iron and steel products, and a study of these reports reveals the fact that no steel stove ranges whatever are manufactured within the State of Arkansas.

### Clocks.

1900 U. S. Census, Vol. VII (Manufacturers Part 1), p. 146, shows in detail the location of factories manufacturing clocks. According to this report, there were 46 such factories in the United States employing a total capital of nearly $9,000,000. 20 of these factories employing a capital of nearly $8,000,000 were located in Connecticut and New York. Illinois has 7 factories, Massachusetts 5, Missouri 3. In all

the other states, there are a total of 11 factories manufacturing clocks. The combined capital employed in these 11 factories is only 2 per cent of the capital employed in the industry in the United States. Of these 11 factories located in all the remaining states, Arkansas is credited with having one, no details being given as to the volume or extent of its separate business. It is fair to assume that its business was small and was probably largely repairing instead of manufacturing clocks. At any rate, in 1905, this one factory in Arkansas, which was classified as manufacturing clocks, had quit business. See Special Reports of Census Office, 1905, (Part 1, Manufacturers) p. 162, where the location of all factories making clocks is given and where it appears that there are now no factories within the State of Arkansas manufacturing clocks.

## Pumps.

1900 U. S. Census, Vol. VII (Manufacturers Part 1), p. 374, shows the location of all factories in the United States manufacturing pumps. From this report, it appears that there are 130 such establishments in the United States. and that none of them are located within the State of Arkansas.

So also in 1905, an examination of the Special Reports of the Census Office, 1905 (Part 1, manufacturers), p. 370, which shows a similar record of those engaged in manufacturing pumps, discloses that there are no pumps whatever manufactured within the State of Arkansas.

## Buggies.

1900 U. S. Census, Vol. VII (Manufacturers Part 1), p. 130, shows that there were in the United States 7632 estab-

lishments which were classified as manufacturing buggies and which employed a total capital of $118,000,000. The report credits Arkansas with having 40 such establishments, which is only 1-2 of 1 per cent of the total number of such factories. The combined capital of all these 40 establishments in Arkansas, is only 1-10 of 1 per cent of the capital employed in the industry.

1900 U. S. Census, Vol. X (Special Report on Selected Industries), p. 297, shows in detail the facts regarding the buggy and carriage industry under the census of 1900 and 1890. This report shows that there were in Arkansas in 1890, 23 establishments classified as making buggies. It appears that these 23 factories in 1890 expended considerably more in wages to employes than did the 40 factories in 1900. On p. 301 of this report, is a chart showing the relative rank of all states and territories in the carriage industry based on the total value of their products. In this chart, 36 states and territories are ranked, and Arkansas stands 35th, only one state, Florida, being ranked lower. On p. 308 of this report, are further details regarding these establishments. Of the 40 establishments listed, 26 are individuals, 13 are firms or co-partnerships, while only one is an incorporated company, indicating that most of these establishments which are classified as manufacturing carriages are probably merely individual blacksmiths, who do some little construction work in connection with buggy and carriage repairing.

In 1905, the Special Reports of the Census Office, (Part 1, Manufacturers), p. 186 and 208, show a similar chart of the relative rank of the various states in the carriage industry in which the State of Arkansas ranked 36th. P. 142 and 143 of the same report show that in 1905, the number of establishments in Arkansas classified as manufacturing carriages had dwindled from 40 down to 16, and

that the total combined value of all their products was only 1-10 of 1 per cent of the whole industry.

1905 Special Report of Census Office, (Part 4, Manufacturers—Selected Industries) gives on p. 312, a special report on the carriage and buggy industry, and shows in detail the product of these factories. It appears in this report that in the 16 factories in Arkansas classified as manufacturing buggies and carriages there were in all of them a total of only 35 buggies or carriages manufactured in the whole state of Arkansas; that of these 35 buggies, 27 were one-seated buggies or carriages, and only 8 were two-seated carriages, surreys, etc. All the rest of the product of these 16 factories is shown to be heavy farm wagons, dump carts, delivery carts, etc., none of which, under the familiar rule of *ejusdem generis,* are covered by the Arkansas statute. During the period covered by this report, there were 937,409 buggies and carriages manufactured in the United States, and the State of Arkansas manufactured, a total of only 35 buggies or carriages or only 1-267 of 1 per cent. At the time of writing this brief, the figures for the 1910 census are not available. A few fragmentary advance sheets of the 1910 census which are now procurable, do not make any substantial change in the above figures.

In the light of this showing as made by the official reports of the United States government as to the place of manufacture of the five articles named in the Arkansas statute, we repeat most emphatically that none of the articles named are manufactured to any great extent, if at all, within the State of Arkansas. That being true, outside, non-resident manufacturers must furnish the required supply of these necessary articles. It is also undoubtedly true that the articles named in the statute have been sold in Arkansas by some non-resident manufacturers through agents who have brought themselves within the ordinary definition of a ped-

dler and by agents whose methods of sale have not brought them within such a definition, and the operations of these agents have naturally quite seriously interfered with the business of local storekeepers in Arkansas who keep these articles for sale in their stores as part of their stock in trade. The plain purpose of the statute, therefore, in picking out these particular harmless articles is to protect local storekeepers in Arkansas from the competition of non-resident manufacturers who sell these articles directly to users or consumers within the state. If the statute contained this express statement of its purpose, it would unquestionably be held void. *Ward vs. Maryland*, 97 U. S. (12 Wall.) 418, *Welton vs. Missouri*, 91 U. S. 275, *Guy vs. Baltimore*, 100 U. S. 434, *Webber vs. Virginia*, 103 U. S. 344. The statute virtually says to non-resident manufacturers of these articles who must furnish practically the whole supply which is used in Arkansas: If you desire to sell your product in Arkansas, you must sell it to storekeepers or jobbers in what may be called the orthodox way or you cannot sell it in Arkansas at all. In effect, the statute says to him, you must sell your goods in such a way as not to compete with local storekeepers having these articles for sale within the State of Arkansas, or else you must keep out altogether. While this is undoubtedly the purpose and intent of the Arkansas statute, it is curious to note that the statute, as interpreted by the Supreme Court of Arkansas, goes much further than this. The Supreme Court of Arkansas has already construed this statute to apply to a case of strict interstate commerce where the customer was an ultimate user or consumer. See *Crenshaw vs. State of Arkansas*, 130 S. W. 569, and *Rogers vs. State of Arkansas*, 144 S. W. 211.

As before shown, there is no reason why it should not apply equally as well to an interstate commerce transaction where the purchaser was a merchant or storekeeper.

The statute is directed at those who go about through any county and peddle or sell any of the specified articles. Since this language is interpreted to cover an interstate commerce transaction in which the purchaser was an ultimate consumer, it will also apply to a similar interstate commerce transaction if the purchaser is a storekeeper, since the statute makes no distinction between these classes. One who goes about through any county and peddles or sells any of the prescribed articles to storekeepers, violates the statute as much as one who goes about through any county and peddles or sells them to ultimate consumers. The statute, therefore, if impartially enforced, would apply to every drummer who goes about through the state and sells to storekeepers in the most approved and orthodox method, as well as to the salesman or canvasser who goes about selling to individual consumers. As is usual with such statutes, the especially favored class will find that the law, if impartially enforced, would annihilate and destroy the very class and kind of business which it was the purpose of its designers to foster and protect. Since none of the articles named in the statute are manufactured within the State of Arkansas, and since, therefore, practically all of the necessary supply must be furnished by non-resident manufacturers, it is plain that this Arkansas statute, as interpreted by the Supreme Court of Arkansas, will entirely prevent such articles from being introduced in the State of Arkansas and sold there. In fact, we fail to see, since the decision of the Arkansas Supreme Court in the cases of *Crenshaw vs. State*, 130 S. W. 569, and *Rogers vs. State*, 144 S. W. 211, how it is possible for an outside non-resident manufacturer of any of the prohibited articles to extend his trade in the State of Arkansas by soliciting orders for his goods from any person within that state, be he orthodox dealer in such articles or an ultimate user or consumer of them. That such a discrimination af-

fecting only non-resident manufacturers, results in a plain interference with interstate commerce is obvious. A statute whose effect and operation, results in such a discrimination is just as effective as discrimination which results from express terms. It may be frankly admitted that the Arkansas statute under consideration does not in express terms discriminate against non-residents. The discrimination results from the effect and operation of the statute in connection with well known conditions of manufacture and trade within the state, which are matters of common knowledge to those at all acquainted with it. Arkansas has long evidenced an intention to discriminate against non-residents in statutes of this character. To show this, it is only necessary to give something of the history of previous statutes enacted within the state on this subject before the present statute was passed.

In 1885, the legislature of Arkansas passed a statute (Kirby's Ark. Dig. Sec. 6876) which defined a peddler to be one who went about selling goods of any description other than the articles grown, produced or manufactured by the seller himself, or those in his employ, and a tax of $25.00 for a term of six months or less, was levied on him. This statute showed an intention to relieve the manufacturer from the tax, provided he uses this method of selling the goods of his own manufacture only.

Sec. 6878 (Kirby's Ark. Dig.) levies a tax of $100.00 upon each and every clock peddler, each and every agent for the sale of lightning rods and stove range agents doing business in this state, for the term of one year or less. This statute, which was passed in 1883, picks out three articles which, it should be noticed, are three of the same articles which appear in the statute now under consideration, and lays a heavy tax upon their sale. This statute was declared unconstitutional and void in the case of *Hynes vs. Briggs*, 41 Fed. 468.

In 1901, the legislature of Arkansas passed another statute (Kirby's Ark. Dig. Sec. 6886) levying a license tax of $200.00 per year upon peddlers of four or five specific articles (the same ones named in the statute now under consideration). This statute contained the express provision that it should not apply to any resident merchant within the county. This statute was declared void by the Arkansas Supreme Court in the case of *Ex parte Deeds*, 75 Ark. 542, 87 S. W. 1030.

In 1905, another statute was passed by the legislature of Arkansas on this subject (1905 Acts of Ark. p. 469), Sec. I of which is in full as follows:

> "It shall be unlawful for any foreign person or foreign corporation to swap, trade or traffic in horses or mules in this state, or to peddle organs, stove ranges, pianos or vehicles, without first paying a license of $100.00 in each county in which they do said business; provided, this Act shall not apply to any horse or mule trader except such as travel through the country carrying their camping outfits, and who camp on the public domain."

This statute, it will be observed by its express terms, applies only to non-residents, and is, of course, unconstitutional and was so held by various inferior judges no cases having been carried to the Supreme Court of the state under this statute.

The same Legislature in 1905 passed another statute (1905 Acts of Ark. p. 806) which affected peddlers in certain specific counties who sold certain enumerated articles. This statute also provided that it should not apply to a resident merchant who had a fixed place of business within the counties named. By this statute, a license tax of $300.00 was levied from the date of issue to the succeeding January

1st. This statute never reached the Supreme Court of the state for decision, but it was several times held invalid by district Judges throughout the state.

In 1907, another statute was passed by the Arkansas Legislature (1907 Acts of Ark. p. 1171) which regulated peddling in one county only, and it required a graduated license fee up to $200.00 per month. It also exempted certain specific articles from its operation, and it did not apply to traveling salesmen taking orders for future delivery. This statute has not yet been before the courts.

As a culmination to this series of statutes, the 1909 law was passed (1909 Acts of Ark. p. 292), which is the one now under consideration in this case. It is in effect a re-enactment of the statute passed in 1901 which was held invalid by the Supreme Court in the case of *Ex parte Deeds*, 87 S. W. 1030, except that it omits the proviso that it should not apply to any resident merchant within the county. Considering the history of the present statute and the various means which the Legislature has attempted to employ to put heavy burdens upon non-residents, often in express terms, the conclusion is irresistible that the present statute is passed with a feeling that they would be willing to prevent their own manufacturers from peddling the specific articles, since there were, in fact, none who did so, provided only that they could also, at the same time, keep out the non-residents. Since few, if any, of the articles specified are manufactured within the state, the only local effect of the statute is to prevent a few citizens of Arkansas from following the business of a peddler in these articles, while it, at the same time, absolutely prevents an outside manufacturer from selling any of the specified articles within the state by solicitation direct to the user or consumer. This is the object and purpose of the law, and it does not help it much to say that it will, in connection with this object, also apply to Arkansas citizens as well as to Iowa

or Texas citizens who are kept from following the profession of a peddler. The Supreme Court of Arkansas virtually admits that the statute operates only against non-residents, but they assert that this fact is immaterial and that even if it does so operate, it is nevertheless constitutional. The language on this point is as follows: *(Byles vs. State,* 126 S. W. Rep. 94, 98).

> "We are not advised that none of these articles are manufactured in the state; but even if there are none, this does not affect the validity of the statute."

On this point, this Court used the following pertinent language in the case of *Robbins vs. Shelby Taxing District,* 120 U. S. 489, at page 498:

> "It would not be difficult, however, to show that the tax authorized by the State of Tennessee in the present case is discriminative against the merchants and manufacturers of other states. They can only sell their goods in Memphis by the employment of drummers and by means of samples; whilst the merchants and manufacturers of Memphis, having regular licensed houses of business there, have no occasion for such agents, and, if they had, they are not subject to any tax therefor. They are taxed for their licensed houses, it is true; but so, it is presumable, are the merchants and manufacturers of other states in the places where they reside; and the tax on drummers operates greatly to their disadvantage in comparison with the merchants and manufacturers of Memphis. And such was undoubtedly one of its objects."

Other states besides Arkansas have passed similar statutes with similar purposes, and the courts of those states, being familiar with matters of common knowledge there, have

had no hesitation in declaring what the object and purpose, as well as the effect, of such statutes is. For example, the State of Utah in 1907 passed a law (1907 Sess. Laws of Utah, p. 124) by which a license tax of $500.00 a year was levied upon peddlers who sold any one of fifteen or twenty enumerated articles. This statute was held unconstitutional and invalid in the case of *Utah vs. Bayer*, 97 Pac. 129. Although the record contains no statement of the place of manufacture of the prohibited list of articles, the court recognized, as a matter of common knowledge, that the articles named in the statute were not manufactured to any extent, if at all, within the state, and that the effect of the law was to discriminate against non-resident manufacturers of those articles. The Supreme Court of Utah in the course of its opinion says, p. 131:

> "If the legislature had regulated the business of peddling and hawking, and had forbidden the carrying on of such business without first obtaining a license, we think no fault could be found with such an enactment. But this is not what the legislature did. It singled out but a few articles—*such goods as are not produced or manufactured in this state*, and which are not even injurious to health or morals of the community—and required an annual fee or tax of $500 to be paid to peddle any of them, while the business of peddling and hawking of all other goods and articles including those which are injurious to health and morals, and which affect the security of the lives, limbs, and comfort of the people, may be carried on with perfect freedom and without license. * * *"
>
> "Now it is apparent, that under the pretense of exercising a police power or of adopting a revenue measure, the legislature passed the act for the mere benefit of local and domestic dealers." (The italics are ours.)

Similarly, the State of Oregon in 1905 passed a statute (1905 Laws of Ore. p. 3339) providing for a license tax of from $200.00 to $500.00 per year on peddlers of stoves, buggies or fanning mills only. Although not expressly discriminating against non-residents, the purpose and effect of this statute, was precisely the same as the Arkansas statute now under consideration. The Oregon statute was held unconstitutional and invalid in the case of *State vs. Wright*, 100 Pac. 296.

Likewise the Legislature of Colorado in 1905 enacted a peddlers' law imposing enormous license fees, but in which there were no words of express discrimination against non-residents. This statute was declared unconstitutional and void in the case of *Smith vs. Farr*, 104 Pac. 401, largely on the ground of its discriminatory effect and operation. On this point, the court concludes as follows: p. 405,

> "On the contrary when reduced to its final analysis, the license exacted is nothing more or less than a tax imposed on outside manufacturers for the privilege of selling their products in this state direct to the consumer. * * * Such a law clearly violates the provisions of the Federal constitution which the counsel for plaintiff in error have invoked."

Examples of similar legislation, which did not by express terms, discriminate against non-residents of the state which enacted it, but indirectly by its effect and operation had such an effect, were before this court and held unconstitutional in the followingg cases:

*Minn vs. Barber*, 136 U. S. 313 (Minn.);
*Brimmer vs. Rebman*, 138 U. S. 78 (Va.).

## III.

### Due Process of Law.

At the outset, it must be determined whether the statute of Arkansas under consideration is an attempted exercise of the state's police power or of its taxing power. Entirely different considerations apply to the determination of the validity of the one or the other. Although the Supreme Court of Arkansas, judging from its opinions, seem unable to decide or think it unnecessary to determine, whether the law is a taxing law or a police measure, we believe that a fair and reasonable consideration of its terms will prove that the statute is an attempt on the part of the state to exercise its police power and that the statute, if it is to be sustained at all, must be sustained as a valid exercise of that power. There is nothing whatever to indicate in any of its terms or otherwise, that it was intended as a taxing measure to raise revenue for the state. On the contrary, the Act is declared in its title to be an *Act to regulate the sale* of lightning rods, steel stove ranges, clocks, pumps, buggies, etc. It purports to confer authority to engage in a business which would otherwise be unlawful, the statute on this point providing that the applicant before performing any acts, shall procure a license *authorizing him to conduct such business.* The persons affected by the statute are subjected to heavy fine for the violation of its terms. Attempts to sell in violation of the terms of this statute are also subjected to a heavy fine. No attempt is made to collect the fee named, by attachment of the peddler's goods or otherwise, and no procedure is provided by which the collection of the money can be enforced. If a person does business without having a license, he is fined and punished as a criminal. All of these show conclusively that the taxing power of the state is not

involved in any way, and that the statute must be considered as an attempted exercise of the state's police power.

Evidently the Supreme Court of Arkansas has finally come to the definite conclusion that the statute is only an attempted police regulation. In the last case in which they considered the statute in question, *State vs. Rogers,* 144 S. W. Rep. 211, the Court says, p. 213:

> "This statute is directed at an itinerant occupation which may endanger the peace and safety of the citizens of the state, and not at a business which only involves the sale of property. It is but the exercise of the police power of the state. * * *"

It is everywhere admitted that when statutes or ordinances enacted under the police power, provide for the payment of a license fee, the fee exacted must bear some relation to the expenses necessarily incident to the supervision and regulation which the statute imposes. What it means "to regulate" a business is well stated in the case of *Ex parte McCoy,* 101 Pac. 419 (429) Calif.:

> "In the exercise of the police power * * * to what extent may the board go in the direction of exacting the payment of money for the privilege of engaging in a useful and harmless business. Clearly no further than is necessary to regulate the business. What do we mean by regulate? To regulate means to adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles of law. It does not include a power to suppress or prohibit. The elements which enter into the charge are the necessary or probable expense incident to the

> issuing of the license, and the probable expense of such inspection, regulation and police surveillance as municipal authorities may lawfully give to the particular business, the expenses attending direct regulation and oversight and the incidental cost to which the municipality is subjected in properly supervising the business. * * * All the definitions of the term "regulate" restrict its meaning to providing a rule for conducting the business to be regulated, to inspection and police surveillance, supervision and oversight, and the license fee must have relation to expenses incurred for these purposes."

It is not claimed that the statute need exactly correspond to the expenses thus incurred since the state clearly has the right in a proper case, to approximate the expenses for these purposes and to collect the amount in advance. It is absolutely essential, however, that the fee demanded for a license bear some relation to the costs and expenses, or the probable costs and expenses, of the supervision and regulation imposed. In passing, it should be noticed that the Arkansas statute under consideration contains no regulation or supervision whatever. This court called attention to the same lack of any regulatory provisions in considering a similar law in the case of *Brennan vs. Titusville*, 153 U. S. 289 at page 302. There is absolutely no restriction of any kind placed upon the manner of conducting the peddler's business after he has obtained a license. All he must do to obtain a license is to pay the license fee demanded. All persons whether competent or incompetent, trustworthy or untrustworthy, of good repute or of bad repute, by paying the fee can demand a license. After securing a license, he may carry on the business exactly as he pleases without any supervision or oversight or regulation whatever as to its conduct. No standard of requirements for issuing a license is

stated, and no standard of performance in any particular is suggested. This being true, the expenses necessarily incident to the regulation and supervision are nil. Where there is absolutely no regulation or supervision provided for, there certainly can be no expense for that purpose. The only possible expenses which the statute contemplates would be the necessary fees for preparing and issuing the licenses and the fees of the officers having that work in charge. The applicant must pay the money to the County Treasurer who issues a receipt therefor. This receipt is presented to the County Clerk who thereupon issues a license to the applicant. These are the only officers charged by the statute with any duty whatever in respect to this statute. The expenses necessarily incident to such work by these officers could not possibly amount in any case to more than $5.00 per year. This would certainly cover any reasonable charge for printing the licenses and cover any necessary fees of the officers for keeping track of the money collected or of the licenses issued. The Arkansas statute, therefore, exacts, at least, forty times as much as may be contemplated as reasonable expenses incident to its operation.

In a similar case in which an ordinance was passed to regulate laundries, a license fee of $20.00 a year was exacted. The Federal Court in the *Laundry License* case, 22 Fed. 701, held that the amount of the license fee was far beyond any sum necessary for reasonable regulation imposed by the ordinance, and that it was, therefore, unconstitutional. The court says, p. 704:

> "It is difficult to see how there can be any special or extraordinary expense dependent upon this regulation, except for issuing and recording the license, and certainly the sum of one dollar is amply sufficient for that. * * * There is nothing in the business or proposed

> regulations for which the city is likely to incur any special expense. * * * All things considered, it is apparent that the sum required to be paid the city for this license is far beyond any special expense that it may incur on account of the regulation to which it pertains."

An ordinance which imposed an annual license fee on a telegraph company of $1.00 on each pole and $2.50 on each mile of wire used, was before this court in the case of *Postal Cable Telegraph Company vs. Taylor*, 192 U. S. 64. Regarding the size of the fee demanded as indicating whether the law was a valid police measure, this court said, p. 69:

> "We can come to no other conclusion than that the ordinance was void because of the unreasonable amount of the license provided for therein. It was urged on the argument that this ordinance was a proper police regulation, and that the collection of revenue was not its object; that it was the duty of the borough officials to protect the lives and property of its citizens, and that in the discharge of such duty, it had the right to constantly inspect the poles and wires for the purpose of seeing that they were safe. There is no doubt that, for the purpose mentioned, the borough had the right claimed by its counsel. The averments of the affidavit of defence, however, show that no such duty has been discharged or attempted to be discharged by the borough. It has done absolutely nothing to protect the lives or property of its citizens by inspecting the poles and wires of the defendant. * * * We come then to an examination of the question whether this fee in the light of the admitted facts set forth in the affidavit of defence, can, by the widest stretch of imagination, be regarded as reasonable. The borough is, where the poles are planted and the wires stretched, sparsely settled, and the danger to be apprehended from

neglect in regard to the poles and wires is reduced to a minimum. The borough has in fact done nothing in the way of inspection or supervision during the time covered by the license in question. It has not expended one dollar for any such purpose. It has incurred no liability to pay any expenses arising from inspection or supervision on its behalf. * * * When we come to an examination of the grounds upon which this kind of a tax is justifiable, and when we find that in this case each one of those grounds is absent, how is it possible to uphold the validity of such an ordinance? To uphold it in such a case as this is to say that it may be passed for one purpose and used for another; passed as a police inspection measure and used for the purpose of raising revenue; that the enactment as a police measure may be used as a mere subterfuge for the purpose of raising revenue. * * * It is thus to be declared legal upon a basis and for a reason that do not exist in fact. We think the court is not bound to acknowledge an ordinance such as this to be valid in face of the facts stated in the affidavit of defence. Confessedly there has been here no inspection, no expense incurred to provide for one even though not made, and all expenses and liabilities that might fairly and reasonably be incurred on the part of the borough are not one-twentieth of the amount it exacts for an inspection which it has not made. * * * Judging the intention of the borough by its action it did not intend to expend anything for an inspection of the poles and wires, and did intend to raise revenue under the ordinance. Courts are not to be deceived by the mere phraseology in which the ordinance is couched when the action of the borough in the light of the facts set forth in the affidavit shows conclusively that it was not passed to repay the expenses or provide for the liabilities incurred in the way of inspection or for proper supervision."

Similar questions arose in the case of *Cache County vs. Jensen*, 21 Utah, 207, 61 Pac. 306, where the court in considering an ordinance imposing an enormous license tax on the business of sheep herding, says, p. 307:

> "The ordinance does not even contain a hint as to regulation of the business, nor that the business requires any regulation, nor that the county will afford protection of any kind to the persons engaged in the business, nor that it is of such a character as to require regulation or protection. The business may be conducted by those engaged therein where and how they will. No intention to regulate it is manifest from the context or otherwise. The ordinance imposes no restrictions as to the manner the business shall be carried on and grants no lawful privilege that was not previously enjoyed. * * *
>
> The thing provided for by this instrument is not a license within the terms of the statute, but by design a prohibitive tax in violation of the statute and constitution. * * *
>
> Counsel for the respondent suggests that the business of sheep raising needs some degree of regulation, and doubtless this is true; for where large bands of sheep are herded the public welfare, in all probability, requires that there be regulation and protection. But the answer to the suggestion is that the ordinance provides for neither. If it had been designed to regulate and protect, it would possess some merit; but it was manifestly intended for no such purpose."

The size of the license fee demanded by the Arkansas Statute under consideration, shows very plainly that its purpose is to suppress entirely the business covered by its terms and not to provide a fund which corresponds, in a fair and reasonable way, to the costs and expenses of regulation and supervision which, in the Arkansas statute, are so small, or

so entirely lacking, that they may be disregarded. The amount of the license fee is obviously put so high that no person can pay it and continue in the business which comes within its terms. The history and antecedents of this statute, which have already been shown, show plainly enough that this is not only its necessary effect, but that it is exactly the result which was intended. The frequency with which statutes on this subject have been passed by the Arkansas Legislature, their persistent efforts to keep out non-residents by express terms, and the constantly increasing size of the license fees demanded and penalties exacted, show conclusively that prohibition of the business to which the statute refers and entire suppression of it, is the plain object of the law. The history of these enactments would seem to show that the Arkansas Legislature has tried one statute after another, and if the earlier statute was not operating with sufficient force to keep out non-residents, they would enact another with larger fees and more onerous penalties.

In other states where similar laws have been passed with similar purposes and like results, the courts have had no difficulty in concluding that the statutes were prohibitive and confiscatory and were intended to have that effect. In Washington, the history of similar legislation is given with considerable detail by Judge Whitson of the Federal Court for the Eastern District of Washington in the case of *Spaulding vs. Evenson*, 149 Fed. 913. At the close of this summary, the court concludes as follows, p. 920:

> "It is a matter of common notoriety that this legislation was enacted at the suggestion and for the benefit of local dealers. *The amount fixed for license by the Legislature was intended to be prohibitive of competition of peddlers.* Shortly after the decision holding the Act of 1905 unconstitutional, we find the dealers, who had attempted to put the ped-

> dlers out of business by legislation resorting to a very ingenious scheme which has been here disclosed. It is proposed now to accomplish by subterfuge that which the courts of the state have repeatedly held cannot be done directly." (The italics are ours.)

The Legislature of Utah passed a similar statute which was before the court in the case of *Utah vs. Bayer*, 97 Pac. 129. After holding the statute unconstitutional as unjust discrimination and unreasonable classification, the court concludes, p. 131:

> "Now it is apparent, that, under the pretense of exercising a police power or of adopting a revenue measure, the Legislature passed the act for the mere benefit of local and domestic dealers."

So also when the Legislature of Colorado passed a similar law with heavy license fees and enormous penalties, the Supreme Court of Colorado in declaring the statute unconstitutional in the case of *Smith vs. Farr*, 104 Pac. 401, in the course of its opinion said, p. 405:

> "On the contrary when reduced to its final analysis, the license exacted is nothing more or less than a tax imposed on outside manufacturers for the privilege of selling their products in this state direct to the consumer * * * such a law clearly violates the provisions of the Federal Constitution which the counsel for Plaintiff in Error have invoked."

See also *Iowa City vs. Glassman*, 136 N. W. 899 (Iowa) where an ordinance was held void because plainly prohibitive—whether considered as a regulation under the police power or

a tax under the taxing power. The fee in this case was $5 per day or $350 per year. The court says, p. 900:

> "It seems to us plain, on the face of the ordinance itself, that it was not passed in any reasonable attempt to regulate the business of peddling. * * * Now we think it quite evident that the purpose of the council was not to impose a tax on peddlers which would be reasonable * * * but to practically and effectually prohibit such business as that which defendant was attempting to conduct; a business in every respect lawful and entitled to reasonable protection and encouragement. We therefore hold that the tax imposed is unreasonable and on that account the ordinance is void."

See also *Carrollton vs. Bazzette*, 159 Ill. 284, 42 N. E. 847 where a license fee of $10 per day was held to be prohibitive and confiscatory and hence void.

Whether the amount of the license is plainly prohibitive or not, and we believe it is, the statute clearly prohibits and prevents a manufacturer from conducting his lawful business by one method rather than another, and any statute which so results, is unconstitutional. So long as a manufacturer of legitimate, harmless and necessary articles conducts his business honestly, it is impossible for the State of Arkansas, or any other state to compel him to conduct his business by one lawful method rather than another, and the manufacturer of such articles has the right to choose for himself the manner in which he shall conduct his business so long as he deals honestly and squarely with his customers. See *People vs. Jenkins*, 94 N. E. Rep. 1065 (N. Y.) at page 1067. He may decide to sell the product of his factory to retail store-keepers, who, in turn, sell it to their customers in what may be called the orthodox way; he may decide to establish warehouses or branch stores of his own in various states; he may

decide to sell his product directly to users and consumers through his own agents; he may decide to use the United States mails to secure orders for his product, or he may decide to sell his product to wholesalers or jobbers. Any one of these methods, or any other lawful method, may be adopted by him as he chooses, without restraint, without compulsion or dictation by any power exerted by the State of Arkansas or any other state. He cannot be forced to sell his product through the channel of the local dealer or quit business altogether. That the business of selling buggies, or even peddling buggies, is a lawful business, can admit of no doubt. There is no crime necessarily connected with being an itinerant or transient within the State of Arkansas. It can scarcely be expected that all citizens of the United States shall become permanent residents or establish stores or permanent places of business within the State of Arkansas. It must be conceded that those persons who are permanent residents of other states and who have permanent places of business in other states, may come into the State of Arkansas for business purposes even as transients or itinerants, without penalty and without being characterized as criminals for so doing. See *Ex parte Hull*, 153 Fed. 459 (Ala.). See also *State vs. Conlon*, 33 Atl. 519 (Conn.), particularly at p. 520. As to the power of the state to compel a lawful business to be conducted in one mode rather than in another, see the case of *In re Yot Sang*, 75 Fed. 983, where that right was denied. The right to do business within the state of Arkansas is a property right which cannot be taken away without due process of law. The business of selling buggies is a lawful business even though sales are made direct to the consumer. There is nothing illegal about it. It is not injurious to public morals nor dangerous to public health or safety, and cannot be prohibited by a state in any valid exercise of its police or taxing power. An occupation, which

is thus perfectly legal and lawfully conducted, cannot be prohibited by a state nor can conditions be annexed to the issuance of a license therefor which will virtually amount to such prohibition. A statute which has this effect and operation, deprives citizens of their property without due process of law within the meaning of the Fourteenth Amendment of the U. S. Constitution.

Regarding the question of the power of the state to prohibit a lawful business, it is well to keep in mind the fact that only those professions and callings can be prohibited which are injurious or harmful to the public no matter who conducts them or how they are conducted. In other words, only those callings can be absolutely prohibited which are *malum in se*. As regards those occupations or callings which are only *malum prohibitum*, the police power of the state can go no further than to make the necessary regulations to prevent injury or harm to the public, and these regulations cannot go further than the necessities of the case require. This principle is very concisely stated by Mr. Tiedeman, and we quote as follows from his work, 1 Tiedeman, State and Federal Control, 505:

> "It has been so often explained and stated that the police power must, when exerted in any direction, be confined to the imposition of those restrictions and burdens which are necessary to promote the general welfare, in other words, to prevent the infliction of a public injury, that it seems to be an unpardonable reiteration to make any further reference to it. But the principle thus enunciated is the key to every problem arising out of the exercise of police power. Applied to the question of prohibition of trades and occupations *it declares unwarranted* by the Constitution *any law which prohibits altogether an occupation, the prosecution of which does not necessarily, and because of*

*its unenviable character, work an injury to the public. It is not sufficient that the public sustains harm from a certain trade or employment, as it is conducted by some who engage in it.* Nor is it sufficient that all remedies for the prevention of the evil prove defective, which falls short of total prohibition. Because many men engaged in the calling persist in so conducting the business that the public suffer and their actions cannot otherwise be effectually controlled, is no justification of a law which prohibits an honest man from conducting the business in such a manner as not to inflict injury upon the public. In order to prohibit the prosecution of a trade altogether the injury to the public, which furnishes the justification of such a law, must proceed from the inherent character of the business. Where it is possible to conduct the business without harm to the public all sorts of police regulations may be instituted, which may tend to suppress the evil. Licenses may be required, the most rigid system of police inspection may be established, and heavy penalties may be imposed for the infractions of the law; *but if the business is not inherently harmful the prosecution of it cannot rightfully be prohibited to one who will conduct the business in a proper and circumspect manner. Such an one would 'be deprived of his* liberty' without due process of law." (The italics are ours.)

## IV.

### Equal Protection of the Laws.

The Arkansas statute under consideration arbitrarily discriminates between persons in substantially the same situation by the unreasonable classification which it proposes and is, therefore unconstitutional and invalid. It plainly denies the equal protection of the laws to those against

whom it discriminates. As before shown, the statute is an attempted exercise of the police power of the state. Its title, its form, its language, its context, its manner of enforcement, its penalties all show conclusively that the police power of the state is the one to which it must be ascribed. Its validity therefore, must be determined by the rules and tests which apply generally to the enactment of laws under the police power. It is, of course, fundamental that the reason for the enactment of any police regulation is to prevent some offense or manifest evil or to preserve the health, morals and safety or welfare of the public. To sustain a police measure, if it is attacked, the court must be able to see that the statute was passed not only for such a purpose, but that it will have such tendency and effect. It is not enough that the statute benefits one class of merchants or citizens. It must be for the public good. As was very well said by Mr. Justice Brown in the case of *Lawton vs. Steele*, 152 U. S. 133, at p. 137:

> "To justify the state in thus interposing its authority in behalf of the public, it must appear, first that the interests of the public generally, as distinguished from a particular class, require such interference; and second, that the means was reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations."

This court has also said in the case of *Holden vs. Hardy*, 169 U. S. 366 at page 398,

> "The question in each case is whether the legislature has adopted the statute in exercise

> of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class."

The Arkansas statute picks out five harmless, necessary articles and imposes a heavy penalty upon any one who peddles or sells them without a license. It is apparent, therefore, that if the Arkansas statute can be sustained at all as a police measure, it will have to be sustained because there is some inherent evil or danger or public harm either in the articles themselves or in the manner in which they are sold. Stoves, lightning rods, clocks, pumps and buggies are not intrinsically harmful or injurious either in their use or enjoyment. No objection whatever can be urged against any of these articles on the ground of their being injurious to the public health or comfort or detrimental in any way to the public welfare. They are all of them harmless articles of universal use, and may well be termed necessities. Since the articles themselves which the statute enumerates are not in any possible way injurious or harmful, the only other ground on which the statute can be sustained is that the method of sale which the statute penalizes is injurious or harmful to the public. Obviously, if the method or manner of sale is injurious or harmful to the public, all who follow or use this method or manner of sale must be covered by its terms, irrespective of what article he may be selling, provided it is not in itself harmful or injurious; otherwise, the statute is partial and discriminatory because penalizing one person for performing acts from which another person in substantially the same situation, is relieved. In the Arkansas statute under consideration there is no pretense that the occupation of a peddler as a whole is penalized or punished. Only certain peddlers who sell certain specified articles in a certain

way come within the terms of the statute. The statute makes a classification based upon the articles sold by certain peddlers. Only those who sell, 1st, lightning rods, 2d, steel stove ranges, 3d, clocks, 4th, pumps or 5th, buggies come within the terms of the law. Therefore a peddler who sells in precisely the same manner and at exactly the same time to the same purchaser such articles, for example, as organs or sewing machines, shot guns or pianos, groceries or furniture, jewelry or dry goods, or any one of a thousand other articles, can be subjected to no license tax whatever. Moreover, the difference,or,rather lack of difference between them, makes it apparent that the classification proposed is merely arbitrary without any substantial basis in law, in business or in fact. The arbitrary nature of the classification can be readily perceived when it is observed that a peddler could go about offering for sale at the same time, buggies and groceries, clocks and dry goods, pumps and jewelry. His business could be carried on by selling the same customer at the same time and in precisely the same way any of the articles just named. Under the Arkansas statute, if he had no license, part of his sales would be praiseworthy and proper and part of them would be criminal, while it is apparent that all his dealings are of precisely the same kind or nature.

There is no pretense that the statute applies to all peddlers. It does no good, therefore, to argue that peddlers as a class require supervision and regulation in a different way than those who sell goods at a fixed place of business. It does no good to say that peddlers from time immemorial have been rogues and cheats, and that, therefore, this statute ought to be sustained. All such arguments strengthen and fortify our position that the statute must apply to all persons who engage in peddling, no matter what particular harmless article he may be selling. If it be asserted that the

peddling of goods offers opportunities for the commission of fraud and misrepresentation to a greater degree than those who sell goods in other ways, and that, therefore, the police power should extend to the regulation and control of their business, the obvious answer is that the statute under consideration makes no such classification. The unreasonable classification which the statute proposes is not that of all peddlers on the one hand, and those who sell by a different method on the other hand. It is a classification among peddlers themselves based upon the articles which he may be selling. A peddler who sells one harmless article is penalized, while a peddler who sells another harmless article is entirely exempted, while the difference between the articles may be so slight that they may be considered identical. As respects the purpose of the law, one cannot be wrong and the other right. Either both are right or both are wrong. In the present case, it is not necessary to deny the right of the state to regulate the business of peddling. For the purposes of this case, it may well be conceded that the state has this right. The present statute of Arkansas, however, is not grounded upon any such right. It does not regulate the business of peddling as a whole and does not pretend to. It singles out merely four or five harmless necessities of life, and levies an enormous tax upon their sale. The classification, therefore, which results is unquestionably merely arbitrary and capricious, defying any analysis or justification. Under the police power, any proposed classification must be judged by whether or not it rests upon some reasonable ground of difference between the classes which require that different people shall be placed in different classes in order to carry out the purpose for which the classification is proposed. There can be no arbitrary discrimination between persons in substantially the same situation with respect to the pur-

pose of the law. When a classification under the police power is attacked as being arbitrary, it is obviously no answer to say that it applies equally to all who come within the class, and hence is valid. The same thing might be said of the most arbitrary classification imaginable. If a statute makes certain acts criminal when committed by a man with red hair or by a man of a certain statute or weight, it could be truthfully asserted that it applied without discrimination to all who came within the class designated but this plainly dodges the whole question and misses the whole point of the attack. Such reasoning is merely superficial and does not reach the fundamental principles involved. The vital question is: Is there any reason whatever for treating a red haired man or a man of a certain stature or weight any differently from any other man in order to carry out the purpose of the statute? So in the present case, it is not enough to say that the statute applies with perfect equality to all who come within its restricted terms. Such an answer disregards entirely the fact that the basis of the classification itself is what is being attacked. What must be shown in order to sustain the classification is some valid reason, consistent with the purpose of the law, why a peddler of stoves needs regulation and a peddler of sewing machines for example, does not; or why a peddler of clocks needs supervision and a peddler of pictures does not; or why a peddler of buggies needs to be restrained and one who sells pianos does not, or why a peddler of *steel* stove ranges needs regulation and a peddler of *cast iron* stove ranges does not, or why a peddler of steel stove *ranges* requires supervision and a peddler of steel *heating stoves* does not. In other words, why the sale of any of the harmless articles specified in the statute needs to be regulated and prohibited any more or any differently than the sale of any one of a thousand other

harmless articles. That this is not merely captious see *Hawkins vs. State*, 75 S. W. 26 (Tex.), where under a similar statute directed against "cooking stoves or ranges", an indictment was held to be fatally defective which alleged merely that defendant peddled stoves. It must be alleged and proved that the stoves were "cooking" stoves. Keeping in mind the fact that we are objecting to the basis of the classification itself, let us attempt to get down to the fundamental principles involved, and let us apply the following tests to the Arkansas statute under consideration: What is the object or purpose of this law? What is the purpose for which such a classification is proposed? Does such a classification reasonably tend to promote such a purpose? What is the offense or manifest evil which the statute is presumably passed to prevent? Is this evil (if any exists) inherent in the business of all peddlers, or is it confined exclusively to a few peddlers only? Is it an evil which results necessarily from the mode or manner of conducting the peddling business, and hence applies to all peddlers, or is it an evil which depends only on the articles which the peddler is selling, and hence applies only to those peddlers who sell such articles? Does a classification of peddlers based on the articles he sells, all of which are harmless, have any relation whatever to the purpose for which the statute was enacted? Does not a classification based on the articles sold require only that dangerous and injurious articles be classed differently from harmless and necessary articles? What is the specific evil which results from selling a stove which does not result, for example, from selling an organ or from selling a steel stove range which does not apply to a cast iron stove range; or what specific harm results from the sale of a clock which does not result from the sale of a picture; or why is the sale of a buggy more injurious, or likely to be more injurious, than

the sale of a piano? What is the specific evil which results from peddling one article which does not result from peddling another article, provided both are harmless? What specific evils result exclusively from the sale of the five articles enumerated in the statute? Do these evils (if any exist) threaten harm to the public generally, or do they merely injure the trade or business of a certain class of local merchants or storekeepers? Honest answers to the above questions will demonstrate that the classification proposed by the Arkansas statute is extremely arbitrary and capricious, reasons for the classification being wholly lacking. Honest answers to the above questions will furthermore be conclusive that the Arkansas statute under consideration cannot be considered a proper or valid exercise of the police power. Truthful answers will make it apparent that proper police supervision was not contemplated or intended.

Several states have already declared unconstitutional statutes almost identical with the Arkansas statute. The state of Oregon had a peddlers' license law which was almost identical with the Arkansas statute. In the Oregon law the sale of three harmless articles was picked out for regulation, while the Arkansas statute picks out five. In the Oregon law, a license tax of $200.00 or more annually was levied on those who peddled stoves, buggies or fanning mills. The Supreme Court of Oregon held this law unconstitutional in the case of *State of Oregon vs. Wright*, 100 Pac. 296. On this point the court says, p. 298:

> "A statute, which directly or by implication grants special privileges, or imposes special burdens, upon persons engaged in substantially the same business, under the same conditions, cannot be sound, because it is class legislation, and an infringement of the equal rights guaranteed to all. * * * (Citing cases). The statute under consideration is plainly in viola-

tion of this principle. There is no pretense that it applies to the occupation of peddlers or itinerant vendors as a whole or generally. It requires persons engaged in peddling a few enumerated articles to obtain a license and pay an exorbitant, if not prohibitive fee therefor, while peddlers of all other articles may exercise their calling without any restriction or restraint. It makes an arbitrary classification, based upon the articles sold, regardless of whether they are injurious or detrimental in any way. A peddler who sells stoves, buggies, or fanning mills, all of them legitimate and necessary articles, comes within the statute, but one who sells clocks, patent medicines, pianos, fruit trees, sewing machines, jewelry, dynamite or any one of a thousand other articles, whether harmful or not may do so without penalty and punishment, and without being required to pay a fee therefor. The business of peddling, and its attendant evils, is, however, the same in either case. If evil consequences are likely to flow from it at all, these consequences will follow from the peddling of the exempted articles, as well as the prohibited ones. It certainly cannot be wrong to peddle stoves, buggies, or fanning mills, and right to peddle patent medicines, lightning rods, or dynamite. A peddler could go about the country selling to the same customer a stove, buggy or fanning mill, and groceries, dry goods, or any articles not within the prohibited list, and under this statute, if he had no license part of his sales would render him a criminal, while part would be praiseworthy and proper. Such a classification is purely arbitrary and plainly denies the equal protection of the law to those against whom it is directed. The constitutional objection to it is that it operates unequally, in that it requires certain persons engaged in peddling a few enumerated, useful articles to obtain a license, and exempts others engaged in the same business and therefore is void. * * * (Citing cases.)"

So also a statute of Utah picked out fifteen or twenty harmless articles and imposed an enormous license tax on their sale. The Supreme Court of Utah held the statute unconstitutional in the case of *State vs. Bayer*, 97 Pac. 129, and on this point, the court says, p. 131:

> "If the Legislature had regulated the business of peddling and hawking and had forbidden the carrying on of such business without first obtaining a license, we think no fault could be found with such an enactment. But this is not what the Legislature did. It singled out but a few articles—such goods as are not produced or manufactured in this state and which are not even injurious to health or morals of the community—and required an annual fee or tax of $500.00 to be paid to peddle any of them, while the business of peddling and hawking of all other goods and articles, including those which are injurious to health and morals, and which affect the security of the lives, limbs, and comfort of the people, may be carried on with perfect freedom and without license. That is to say, under the act one may peddle shot-guns and bowie knives, dynamite, and gunpowder, celery compound and cocaine, tobacco and opium, and many other things (whether harmful or harmless) without license and with impunity; but to peddle the Holy Bible or any other book, wagons, buggies and stoves, sewing machines, and a few other articles enumerated in the statute an annual fee or tax of $500.00 is exacted. Now, it is apparent that, under the pretense of exercising a police power or of adopting a revenue measure, the Legislature passed the act for the mere benefit of local and domestic dealers."

Similarly, the state of Colorado passed an itinerant vendor's law imposing an enormous license fee, but instead of specifying a certain list of articles, it exempted all peddlers

and itinerant vendors who sold to merchants in the regular course of business, thus adopting as a basis of classification not the articles sold by the peddler, but who his possible customers might be. This statute was held unconstitutional and void in the case of *Smith vs. Farr*, 104 Pac. 401. Speaking on this point, the court says, p. 405:

> "The act exempts from its operation commercial travelers or agents selling to merchants in the usual course of business. This is a discrimination without any reason. An itinerant vendor, as defined by this act, may without license travel from place to place, carrying with him manufactured articles to sell to merchants, while another carrying the same articles and traveling in the same way is inhibited from disposing of his wares to the customer direct unless he has paid a license fee for the privilege of making such disposition of his property in that way. A burden is imposed upon one itinerant vendor from which another is exempt. We can see no reason why one selling to a merchant may do so without paying a license fee, while another who sells the same article to a farmer must pay that fee. In short under the statute, one may enjoy a right which is denied another within the same jurisdiction in like circumstances."

So also a statute of Texas relating to peddlers which created an unreasonable classification by making numerous exemptions from the law, was declared unconstitutional in the case of *Ex Parte Jones*, 43 S. W. 513 (Tex.). Similarly a statute of Minnesota on the subject of peddlers was declared invalid because of the illegal classification which it proposed. See *State vs. Wagener*, 72 N. W. 67 (Minn.).

The principle for which we are contending is absolutely fundamental and universal. It applies to every statute of every kind which purports to exert the police power of the

state, no matter what business or what act or what calling is affected. All sorts of laws are passed by the various states on all sorts of subjects by which the police power of the state is attempted to be exercised to correct some real or imaginary evil. When these statutes are brought before the courts and their validity questioned the courts must be able to see that all persons who come within the purpose for which the law is enacted, are covered by its terms, or otherwise the law is unconstitutional as denying equal protection to all. It frequently happens that such laws are passed as the result of improper pressure being exerted on the legislature, and the law as a consequence, is found to be enacted for the particular benefit of some class of persons who have been thus enabled to secure special benefits or privileges or protection of some kind. On this point, this court well said in the case of *Lochner v. New York*, 198 U. S. 45 at p. 52:

> "It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting public health or welfare, are in reality passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates,, it is apparent that the public health or welfare bears but the most remote relation to the law."

To illustrate the point that the principle is of universal application, we will add a number of authorities from various jurisdictions covering all sorts of police regulations on a great variety of subjects.

In the case of the *City of Spokane v. Macho*, 98 Pac. 755 (Wash.), an ordinance was considered which made it unlawful for anyone keeping an employment office to make any wilful misrepresentation or to wilfully deceive any person

seeking employment. This ordinance was held unconstitutional because of the improper classification. The court on this point says, p. 756:

> "From the very nature of things, there can be no dissimilarity of condition or situation between the employment agent who indulges in a false pretense or any other person who resorts to deceit or fraudulent representation to accomplish a wayward purpose. * * * The ordinance makes the act of one engaged in a particular business a criminal, while the same act committed by another in a different business may go unchallenged by the city. * * * The city has gone beyond the reasonable and constitutional limit of police regulation."

In the case of *Jackson v. State*, 117 S. W. 818 (Tex.) a statute was declared unconstitutional which imposed a license tax on barbers, but which exempted numerous barbers from its operation, and hence resulted in a plain discrimination which made the law invalid. The court said, p. 820:

> "But whatever may have been the thought in the legislative mind as to why these classes of persons should be exempt, in violation of the provisions of the constitution, we are of opinion that such intent can not operate and we are of opinion that the favored and exempted classes mentioned, especially with reference to the barbers in schools and eleemosynary institutions, cannot be exempt, and the law remain constitutional. Sanitary regulations should operate upon all alike when subject to the same conditions."

So statutes have been passed in many states attempting to regulate the business of plumbers, but some of them have attempted to exempt master-plumbers from their terms, while

others have provided that only one license need be taken out by a firm or corporation. These laws permit one person to engage in the business without penalty, while another under similar circumstances is penalized or punished. Naturally, these laws have all been held unconstitutional. See *State v. Gardner*, 51 N. E. 136 (Ohio); *State v. Justus*, 97 N. W. 124 (Minn.); *State v. Smith*, 84 Pac. 851 (Wash.); *Henry v. Campbell*, Clerk, 67 S. E. 390 (Ga.).

A Missouri statute attempted to regulate the bakery business, and it provided, among other things, certain regulations as to all rooms or buildings occupied as biscuit,, bread or cake bakeries. The law was held unconstitutional since it did not refer to those engaged in making pie, pastry, crackers and confectioneries, who stood in exactly the same position with respect to the purpose of the law, and the statute, therefore, created an unreasonable classification. See *State v. Miksicek*, 125 S. W. 507 (Mo.). On this point, the court says, p. 512:

> "* * * Where a statute, as in the case at bar, so manifestly discriminates between persons or associations belonging to the same class, we have always felt that if the organic law of the state was to be regarded as having any force or vitality, and is longer to furnish any guide to the law-making power in the enactment of legislation, such a statute should be unhesitatingly condemned. If the bakery business is recognized as an unhealthy pursuit for those who actually engage in the operation of the work, it is not a difficult matter to enact a law for the protection of the health of those engaged in such work by making it applicable to all persons, associations or corporations engaged in the bakery business. In other words, let the law embrace all bakers in a class, covering every feature and character of the output or products of their bakeries."

The State of New York passed a statute which required a license for conducting a public dancing academy, and defined the term as any room or place where dancing is taught to the public for a consideration. It will be observed that this definition exempts public dances where no instruction is given; no regulation in such cases being provided, either as to the persons conducting them or the place where held. This statute was recently held unconstitutional in the case of *People v. Wilber*, 90 N. E. 1140 (N. Y.), as an unconstitutional interference with the right to carry on a lawful business and an unconstitutional discrimination resulting from a classification unreasonable and arbitrary and without basis in fact between places where public dances are conducted. The court on this point said, p. 1143:

> "Police regulations must not be unreasonable nor must they make unjust discrimination against individuals or classes. By the act in question, a room or place may be occupied for dancing on Monday without license being required therefor, and on Tuesday, if the same persons are engaged in the same dance, in the same room or place, under the instruction of a teacher, such room or place must be licensed or the statute is violated. * * * The discrimination is based upon a ground that is without reason. There is nothing in the fact of teaching dancing as distinguished from dancing without a teacher that has any injurious effect upon or relation to the morals, health and good order of a community. A discrimination that is made in the exercise of the police power must be based upon some reason. It is true that the reason may not always be a satisfactory one, but it must be a plausible one, and have some substantial basis on which to rest. There has not been presented to us a reason why a license should be required of a place or room where dancing is taught that does not apply, with

> even greater force, to rooms and places in which dancing is generally indulged in without the aid of a teacher. * * * The relator should be discharged from custody."

A statute of New Jersey made it a misdemeanor for any manager of a theater or public amusement to admit a child under sixteen years of age unaccompanied by an adult. The statute did not apply, however, to entertainments held upon piers devoted to public entertainments. This statute was very properly held unconstitutional in the case of *In re Van Horne*, 70 Atl. 986 (N. J.), the court taking the position that it created an arbitrary and unreasonable classification because if it was necessary that children attending theaters should be accompanied by adults, it certainly made no difference where the theater was located, whether on a pier or not.

So also where a statute attempts to regulate or prohibit working on Sunday. It is impossible to single out one occupation only for such regulation or prohibition. A statute of this sort which applies only to barbers is unconstitutional. See *City of Tacoma v. Krech*, 46 Pac. 855 (Wash.). Nor can such a statute or ordinance apply only to clothing merchants. *City of Denver v. Bach*, 58 Pac, 1089 (Colo.).

Similarly, a statute of Florida attempted to regulate common carriers, but it made an unreasonable classification by which only railroad companies were affected. In declaring the statute unconstitutional in the case of *Seaboard Airline Railway v. Simon*, 47 So. 1001, the court said:

> "If a statute, in providing a regulation arbitrarily or unjustly discriminates between persons or corporations that are similarly conditioned with reference to the duties regulated the organic provisions securing property rights may be violated. No greater burdens should be laid upon one than are laid upon others in

> the same calling and condition with reference to the subject regulated. * * * There appears to be no valid reason for making regulations for railroads materially different from those made for express companies, steamboats, and perhaps other common carriers of goods in a subject that is legally and naturally and universally applicable to all common carriers alike. * * * But, under the decisions of the Supreme Court of the United States, where there appears to be no just basis for a classification adopted, and the regulation imposes a material burden upon a part only of a comprehensive class with reference to legal duties and obligations that pertain in substantially the same manner to all of the class, the classification is not in accord with the requirements of the constitution as to due process of law and the equal protection of the laws."

So also in the case of *State v. Ashbrook*, 55 S. W. 627, the Supreme Court of Missouri was considering a statute which attempted to regulate department stores by an elaborate classification of them depending upon the goods sold by them and the amount of their sales, etc. The statute was held unconstitutional as pernicious class legislation. On this question, the court says, p. 632:

> "As said above, no reason has been given or suggested, and, to our minds, none can be conceived why the arbitrary selection of persons and corporations having or exposing for sale, in the same store or building, under a unit of management or superintendency at retail in the cities of the state having a population of 50,000 inhabitants, any articles of goods, wares or merchandise set out and named in Section 1, of the act in question of more than one of the several classifications or groups therein designated, when 15 or more persons are employed, was named or made, for the imposition of the

> license fee provided in the act, from which all other persons and merchants of the state are exempted. Such classification is wholly without reason or necessity. It is so arbitrary and unreasonable as to defy suggestion to the contrary. The simple statement of its creation is a most fatal blow to its continued existence. It is truly 'classification run wild'. It is special legislation unrestrained. To have made the act apply to all merchants of a given avoirdupois, or to those employing clerks of a designated stature, or to those doing business in buildings of a special architectural design, would have been as natural and as reasonable a classification for the purpose in view as the classification made by this act."

Statutes of various sorts passed by the different states have been before the Supreme Court of the United States, and have under the same principle, been held unconstitutional on account of the unreasonable classification which the statutes proposed. For example, see *Gulf etc. Railway v. Ellis*, 165 U. S. 150, in which in a Texas statute, attorney's fees were allowed to the successful litigant in an action to collect a debt, but the statute was effective against railroad companies only. This statute was held invalid by this court, and on the question of classification the court said:

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

Likewise, a statute of Illinois which contained an unreasonable classification was before this court in the case of *Connolly v. Union Sewer Pipe Company*, 184 U. S. 540. This statute prohibited trusts and combinations in general, but the staute did not apply to agricultural products or live stock while in the hands of the producer or raiser. The Supreme Court of the United States reiterates its position that the mere fact of classification does not remove a statute from the reach of the equality clause of the Fourteenth Amendment, but that the classification must always be based upon some reasonable ground which tends to carry out the purpose of the act for which the classification was proposed. The Supreme Court of Arkansas in its opinion in the case of *State v. Byles*, 126 S. W. 94, quotes from this case as to the power of the state regarding taxation. Just following the quotation in the Arkansas opinion, this court continues, p. 563:

> "But different considerations control when the state by legislation seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time indirectly, to build up or protect particular interests and industries. It is quite a different thing for the state, under its general police power to enter the domain of trade or commerce and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade

> or commerce. Such a statute is not a legitimate exercise of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom its discriminates. * * * We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

For a similar decision on a similar statute see *In re Grice*, 79 Fed. 627.

This court had under consideration a statute of Kansas which attempted to regulate stock-yards and to fix rates for their charges, based on the amount or volume of business done, in the case of *Cotting vs. Kansas City Stock Yards Co.*, 183 U. S. 79. The statute was held unconstitutional and void as denying the equal protection of the laws by its arbitrary classification. The court says on page 111:

> "But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two

parties engaged in the same kind of business and under the same conditions, burdens are cast which are not cast upon the other. There can be no pretense that a stockyard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head of cattle per day each year. It is the same business in all its essential elements, and the only difference is that one does more business than the other. But the receipt of an extra two head of cattle per day does not change the character of the business. * * * * This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

In the light of the foregoing authorities, it is submitted that the Arkansas statute under consideration creates a classification which is not only unreasonable but purely arbitrary. We do not believe that it will be possible to suggest any basis whatever for the classification which the statute proposes. At all events it may be confidently asserted that no *valid* reason for such classification can be given. That being true, the resulting classification must be regarded as purely arbitrary and hence unreasonable. Since it permits one person to perform acts without penalty for which another in similar circumstances is punished, it plainly discriminates between persons and denies the equal protection of the laws to those against whom it so discriminates.

## V.

### Statute Is a Trade Measure.

Under this head, we will attempt to present to this court the kernel of the whole controversy. It will be assumed that this court will welcome a knowledge and acquaintance with any facts which will aid in a thorough understanding of the reasons and purposes behind the enactment of the statute of Arkansas under consideration and of similar statutes elsewhere, to the end that this court shall be acquainted with conditions and surroundings enabling them to know and understand matters which are well understood and thoroughly appreciated by all the inhabitants of the states where these statutes are enacted. Matters of public information scattered broadcast in public prints of all sorts among the people which thereby become matters of common knowledge, should not be hidden or concealed from this court. No higher duty devolves upon those who practice before any court than the duty to give the court the benefit of every possible assistance which will enable it to understand the situation of the parties engaged in litigation before it and the underlying reasons for the controversy which has arisen. Courts are entitled to have every controversy reduced to its final analysis and to get at the substance of things rather than the form or shadow. The attitude and duty of this court on this point is well expressed by Mr. Justice Harlan in the case of *Mugler vs. Kansas*, 123 U. S. 623, at p. 661:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limit of its

authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public mortals or the public safety, has no real or substantial relation to those objects or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution."

So also this court has held in the case of *Postal Telegraph Cable Co. vs. Taylor*, 192 U. S. 64:

"That courts are not to be deceived by the mere phraseology in which an ordinance may be couched when it appears conclusively that it was passed for an unlawful purpose and not for the one stated therein."

In the case of *C. B. & Q. Ry. vs. Drainage Commissioners*, 200 U. S. 561 this court says on p. 592:

"And the validity of a police regulation, whether established directly by the state or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary, or reasonable and *whether really designed to accomplish a legitimate public purpose.*" (This language is quoted with approval in 222 U. S. 225 (232). The court continues p. 593:

"If the means employed have no real, substantial relation to public objects which government may legally accomplish; if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt." (The italics are ours.)

So in the case of *Holden vs. Hardy*, 169 U. S. 366 on page 398 this court says:

> "The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class."

It is plain therefore that it is a proper and even necessary inquiry in each case to attempt to find the underlying purpose or reason for the enactment under consideration, to the end that if found to be improper or illegal or unjust or beyond the power of the legislature, effect may be given to the constitutional safeguards which exist for this very contingency.

It frequently happens that some particular class or some special interest is able to persuade the legislature to pass some law for the benefit of such particular class or interest. These statutes take various forms, either attempting to prohibit entirely the conduct of some business injurious to the special class or interest, or quite often they take the form of requiring license and the payment of money in order to engage in business in competition with the special interest or class securing the legislation. Several examples will be given.

A recent New York statute required an undertaker to take out a license as an embalmer, and required that before receiving a license he should have been employed as an assistant to a licensed undertaker continuously for a period of at least three years. In the case of the *People vs. Ringe*, 90 N. E. 451 (N. Y.), decided in January, 1910, this statute was declared void. Even though it was within the police power to require a license of undertakers or embalmers, this statute was declared to be unconstitutional and invalid as

unnecessarily interfering with liberty of person and property and with the common law right to engage in a lawful business. The record shows that the attorney for the New York State Undertakers' Association appeared in this case to assist in sustaining the law. The court held that the whole statute was merely an attempt to corner the undertaking business for the benefit of those then engaged in it, and that the statute was not a proper police measure when used for the accomplishment of any such purpose. The court says, p. 453:

> "A statute passed pursuant to the police power should be reasonable. Its real purpose must be to protect the public health, morals, or general welfare. A statute cannot, under the guise of the police power, but really to affect some purpose not within such power, arbitrarily interfere with a person or a property right."

As to the real purpose of this statute and the interest of the Undertakers' Association in having it sustained, the court said, page 454:

> "We cannot refrain from the thought that the act in question was conceived and promulgated in the interests of those then engaged in the undertaking business, and that the relation which the business bears to the general health, morals, and welfare of the state had much less influence upon its originators than the prospective monopoly that could be exercised with the aid of its provisions."

Similar statutes in Maryland and Massachusetts were held unconstitutional and void in *State vs. Rice*, 80 Atl. Rep. 1026 (Md.) and *Wyeth vs. Cambridge*, 200 Mass. 474-86 N. E. Rep. 925.

Under the authority of general statutes of Ohio, a municipal ordinance was enacted by the village of Tippecanoe attempting to compel the payment of $2.00 per day by hawkers, peddlers or those who took orders for future delivery. In the case of *Great Atlantic & Pacific Tea Co. vs. Village of Tippecanoe*, 96 N. E. Rep. 1092, the Supreme Court of Ohio held this ordinance unconstitutional and void as being, in effect, an attempt to suppress outside competition for the benefit of local storekeepers. The court says on p. 1093:

> "So much has been said respecting the guaranties of such constitutional provisions as are contained in our Bill of Rights demonstrating that the guaranteed right to the enjoyment and use of property includes the right to make contracts generally, that the cases cited in the briefs show that it has become common knowledge that the General Assembly may not by the discriminating imposition of burdens, participate in the rivalries of business, except to the extent that may be authorized by consideration of the public weal. * * * * * We might regret this conclusion if we were informed that in the village of Tippecanoe those who sell merchandise at retail outnumber those who buy from them. Not being so informed, we are serene in the belief that obedience to the requirements of the Constitution will in this instance, as it usually does, result in the greatest good to the greatest number; nor need we vex ourselves to inquire why, at a time when so much is done by legislation and adjudication to prevent the stifling of competition by private contracts, an attempt should be made to stifle it by legislation."

To the same effect is the case of *People vs. Jenkins*, 94 N. E. Rep. 1065 in which the New York Court of Appeals declared unconstitutional a law of New York (Consol Laws

1909 C. 24) which authorized cities of the 3rd class to exact a license fee of $100. per month from transient dealers of goods represented as bankrupt or damaged stock, on the ground that it was manifestly intended to prevent competition. The statute was held void considered either as a taxing measure or as a police regulation. The court says p. 1066,

> "If the statute can be sustained as an exercise either of the police power or of the power of taxation, the decisions below are right and must be affirmed. We think it can be upheld from neither point of view". (The court then shows that the statute has no tendency to prevent fraud, which was the only excuse urged for its enactment.) The court then continues: "But the exaction of $100, as a license fee for a month or for less than a month in villages and cities of the third class (and this statute is confined to such municipalities and towns)—a sum exceeding the monthly rent of a majority of stores in such villages or cities—is too exorbitant to be upheld as a license fee in the strict sense of that term. *These features of the statute plainly show its purpose, which was not to safeguard customers against fraud, but local shopkeepers from competition.* The statute is of the same kind as that condemned by this court in *People vs. Gillson*, 109 N. Y. 389, 17 N. E. 343. * * * * * Every one has the right to adopt such means to sell his goods and conduct his business as he finds most profitable to him, provided those means are honest and the fact that some persons engaged in the same business are dishonest does not justify legislation prohibiting either directly or indirectly the business (citing cases.) * * * * * Treating the statute and the ordinance passed under it as an exercise of the taxing power (though I have no idea it ever was intended as such), the classification is plainly arbitrary

and unreasonable. Transient retailers might be subjected to a reasonable tax, but why a retailer who said his goods were bankrupt or damaged stock should be taxed $100, in a month, and a transient dealer who refrained from such statement should be taxed nothing, I am at a loss to imagine on any theory of taxation, *though as a statute to prevent competition the reason for the distinction is apparent.*" (The italics are ours.)

See also *Jewel Tea Co. vs. Lee's Summit, Mo.*, 189 Fed. Rep. 280 in which an ordinance was held unconstitutional and void which imposed a license or tax of $1.00. per day for selling merchandise at retail from wagons or selling goods by solicitor taking orders for future delivery. A preliminary injunction was granted against the enforcement of this void ordinance by the arrest of complainant's agents. The court says p. 281:

"Ordinances, as well as statutes like this, are in all instances artfully drawn, and their fairness and equality insisted upon. But courts do not observe mere words or phrasing but look to the substance, effect and meaning and, when these are ascertained, enforce the rights of the parties. *The ordinance in question is clearly one to compel the people, in the interest of local merchants and middlemen, to buy their necessities from them; and because* of such influences, the officers first adopt, and then seek to enforce such regulations, *so as to eliminate outside venders of merchandise,* including the necessary articles of food for every family table. The stale argument that the local resident, who votes, and pays the taxes, and otherwise maintains the town, and bears the local burdens, should be given these privileges as against the outsider and non-resident is in all such cases strongly urged. *The tax of $1.00 per day is not intended as a measure*

> *to raise revenue, but it is intended to be, as it will be if enforced, a measure to prohibit all kinds of competition by outsiders.* There is nothing new in all this. It was done by New York and Rhode Island before we had a government. It was the central thought for the creation of our government; and because of such interference the commerce clause was put in our National Constitution, giving to Congress, and it alone, the power to regulate commerce between the states." (The italics are ours.)

On final hearing, a perpetual injunction was granted in the above case. See 198 Fed. Rep. 532.

So the Legislature of Washington passed a statute providing for a license of plumbers, and created a board of examiners to pass on the fitness of applicants. The court held, in the case of *State vs. Smith*, 84 Pac. 851 (Wash.), that this statute did not bear such relation to the public health as to render it a police or sanitary measure, justifiable under the police power. The statute was, in fact, passed to benefit the plumbers then engaged in business. The court on this point says, p. 854:

> "We are not permitted to inquire into the motive of the legislature, and yet, *why should a court blindly declare that the public health is involved when all the rest of mankind know full well that the control of the plumbing business by the board and its licensees is the sole end in view.* We are satisfied that the act has no such relation to the public health as will sustain it as police or sanitary measure, and that its interference with the liberty of the citizens brings it in direct conflict with the Constitution of the United States. The judgment should be reversed, and the prisoner discharged; and it is so ordered." (The italics are ours.)

So in the state of Missouri a statute was enacted, presumably to regulate department stores, but which was, in fact a statute passed in the interest of the small storekeeper. An elaborate classification of stores was proposed, and a graduated scale of licenses provided. This statute was held unconstitutional in the case of *State vs. Ashbrook*, 55 S. W. 627 (Mo.). On this point, the court says p. 629:

> "In no sense can this most extraordinary act be regarded as a police measure, and, consequently, does not fall within the protection of the police power. It nowhere attempts to protect any public interest or defend against any public wrong. It shows upon its face that regulation is not its purpose, but that revenue, or undue restriction in the interests of others, not embraced in the class designated, is the aim in view. While a most onerous license fee by name is imposed, no police inspection, supervision, or regulation is provided, nor is any standard set for the applicant to establish, or that he agrees to attain or maintain, but any and all persons engaged in the business designated in the act, without qualification or hindrance, may come, and a license, on payment of the stipulated sum to the commissioner named in the act, will issue to do business, so far as concerns the act in question. In order to sustain legislation of the character of the act in question as a police measure, the courts must be able to see that its object to some degree tends towards the prevention of some offense or manifest evil, or has for its aim the preservation of the public health, morals, safety or welfare. If no such object is discernible, but the mere guise and masquerade of public control under the name of 'An act to regulate business and trade,' etc., is adopted, that the liberty and property rights of the citizens may be invaded, the court will strike down the act as unwarranted."

Sometimes statutes are passed for the express purpose of prohibiting a certain business or manner of conducting it, merely because it competes with another which the statute designs to protect. Such a statute was before the court in the case of *People vs. Marx*, 2 N. E. 29 (N. Y.), and the statute was for the purpose of prohibiting the sale of oleomargarine because it competed with natural dairy products raised and sold by farmers. The statute was declared unconstitutional and on this point the court says, p. 33:

> "Measures of this kind are dangerous, even to their promoters. If the argument of the respondents in support of the absolute power of the legislature to prohibit one branch of industry for the purpose of protecting another with which it competes can be sustained, why could not the oleomargarine manufacurers, should they obtain sufficient power to influence or control the legislative councils' prohibit the manufacture or sale of dairy products?
>
> Would arguments then be found wanting to demonstrate the invalidity, under the Constitution, for such an act? The principle is the same in both cases. The numbers engaged upon each side of the controversy cannot influence the question here. Equal rights to all are intended to be secured by the establishment of constitutional limits to legislative power, and impartial tribunals to enforce them. Illustrations might be indefinitely multiplied of the evils which would result from legislation which should exclude one class of citizens from industries, lawful in other respects, in order to protect another class against competition. We cannot doubt that such legislation is violative of the letter as well as of the spirit of the constitutional provisions before referred to."

So also in the well considered case of *People vs. Gilson*, 17 N. E. 343 (N. Y.), Judge Peckham speaking for the court at p. 345, says:

> "It is quite clear that some or all of these fundamental and valuable rights are invaded, weakened, limited or destroyed by the legislation, under consideration. It is evidently of that kind which has been so frequent of late,—a kind which is meant to protect some class in the community against the fair, free, and full competition of some other class; the members of the former class thinking it impossible to hold their own against such competition, and therefore flying to the legislature to secure some enactment which shall operate favorable to them, or unfavorably to their competitors, in the commercial, agricultural, manufacturing or producing fields."

So also in the case of *Lochner vs. New York*, 198 U. S. 45, this court on p. 62 says:

> "It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health and welfare are in reality, passed from other motives. We are justified in saying so, when, from the character of the law and the subject upon which it legislates it is apparent that the public health or welfare bears but the most remote relation to the law."

So also in the case of *Robbins vs. Shelby Taxing District*, 120 U. S. 489, where the court was considering a statute imposing a license on canvassers or traveling salesmen. At p. 498, this court says:

> "This kind of taxation is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from

> foreign competition. And in many cases, there may be some reason in their desire for such protection. But this shows in a still stronger light, the unconstitutionality of the tax. It shows that it not only operates as a restriction upon interstate commerce, but that it is intended to have that effect as one of its principal objects."

See further *Caldwell vs. North Carolina*, 187 U. S. 622 where this court was considering an ordinance which was aimed at those who sold and delivered goods, direct to the consumer and which attempted to lay a license tax on that business. The ordinance was declared unconstitutional. This court on p. 632 says:

> "It cannot escape observation that efforts to control commerce, of this kind, in the interests of the states where the purchasers reside, have been frequently made in the form of statutes and municipal ordinances, but that such efforts have been heretofore rendered fruitless by the supervising action of this court. The cases hereinbefore cited disclose the truth of this observation."

At this point, it may be well to recall briefly a little of the history of the peddling business and to call the attention of the court particularly to the fact that a new system of marketing and distributing manufactured goods has been and is now being developed. In early times, it was quite common for impecunious and irresponsible persons to gather together a few goods, put them into a pack and go about the country with this pack on their back, peddling goods to any purchasers who would buy. These men were nomads, having no headquarters or fixed place of abode anywhere, making their home wherever they happened to be, picking up the goods which they sold in any manner and from any

source obtainable. Such persons, being irresponsible and wholly itinerant, early became the subjects of more or less stringent regulation and their business from early time has properly been subjected to provisions which have tended in some degree, at least to keep track of them by requiring a license, although very few statutes attempted to prescribe the mode or manner in which the business could or should be conducted. From time immemorial, there has naturally been an odium attached to such business, and the public in general has grown accustomed to look upon it with suspicion if not actual distrust. The courts of this country, both State and Federal, have frequently had occasion to construe statutes directed toward such business, and in their opinions, the various courts have sometimes used strong language in condemnation of the persons who follow such business and have called attention to the fact that they are frequently frauds and cheats who have large opportunities for carrying on their business unfairly and unjustly. It is to be observed, however, that all the strictures of the courts have been directed against the type of man and the type of business just described, and while the type still remains, it is believed that its numbers are diminishing and its effect upon the aggregate business of the country is so small as to be practically negligible. At the present time, however, merchandizing is in a transitional stage. Within the last fifteen or twenty years, and especially within the last ten or twelve years, there has been a wonderful change and development in the conduct of many large businesses, which the courts cannot fail to observe and notice. A system of merchandizing has sprung up and has grown to large proportions which, though somewhat similar to peddling, has none of the characteristics which have caused the regulation of that business and brought down upon it the distrust of the people in general and the condemnation of the courts.

There are now many large institutions and factories which have adopted a new system of distributing their product, whereby they send their agents or canvassers throughout the country to procure sales directly from the user or consumer for the product of such factories. The only particular in which they resemble the old peddler, is that they go about looking for customers whereever they can find them. Instead of waiting for business to come to them, they go out trying to find or make business. They are the representatives of established concerns with large factories employing many men and with fixed places of business on which they pay large taxes. These concerns have ample capital and stand behind their product in every way and carry out fairly and honestly the terms of sale and the contracts of their representatives. Many of them sell on credit and the deferred payments act as a guaranty of good goods and honest treatment. They are not itinerants, although they frequently do business at points far removed from their factory or fixed place of bussiness; they canvass the territory for customers again and again as often as an increased or recurrent demand exists for the goods they sell. It is in effect a growth and development of a new system of distribution of manufactured goods which is just as honest, just as praiseworthy, just as legitimate, and just as much entitled to protection as any other lawful system of sale and distribution. It is the modern plan of selling goods from manufacturer to consumer direct. It aims to lessen the expense connected with the sale and distribution of manufactured goods and has no little effect on reducing the cost of living or preventing its further increase. Instead of having to encounter organized opposition in the form of legislation instigated by those whose trade is injured, it is entitled to every encouragement and support as a distinct benefit to the great mass of the people. That something is needed to

counteract the monopoly of unrestrained dealers associations, see *Denver Jobbers Assn. vs. People*, 122 Pac. Rep. 404 (Colo.). Sometimes the dealers themselves discuss these new and changing methods of merchandizing. for example, the Pennsylvania Retail Hardware Association held their convention in Pittsburgh, and their proceedings are reported in the Hardware Dealers Magazine for March 1911. Among the papers presented was one by John F. Howe, who bluntly and frankly told the dealers some plain truths. In speaking of the results accomplished by their association, he said, in part: p. 576.

> "Another thing was fighting the catalogue houses, getting many manufacturers to agree not to sell such concerns, and yet they thrive and are doing a larger business than ever. It is perhaps a case of misdirected energy. Here is a case of buying goods in large quantities from the factories at a lower price than that paid by the average retailer; if the selling cost is about that of the retailer it can be readily seen that they can undersell the small retailer. Manufacturers are constantly endeavoring to ascertain cheaper methods to produce goods; why should not the distributor endeavor to ascertain the cheapest method of placing them in the hands of the user? Nearly all manufactured articles are produced cheaper than ever, but the cost of marketing them, from the maker to the user, costs more than ever for the same service. The men who find the cheapest methods of distributing goods are the men who, in the future, are going to succeed. We may object until doomsday to the catalogue house and to the department store selling Hardware, to the large supply houses and the jobber retailer, and they will still go right ahead and do business, and the public will patronize them because they sell cheaper. It may not suit us, but we may as

> well understand the truth; the class of retailers mentioned are simply better merchants than we. Successful merchandising is simply finding the cheapest way to deliver manufactured articles from the maker to the consumer. These catalogue and supply houses have found a cheaper method than the old way, and they will not only succeed and gradually force the retailers to adopt the modern way, but it is right that they should succeed, when viewed in a broad way, recognizing the principle of the greatest good to the greatest number."

The peddler's license statutes which have been enacted in the various states are trade measures pure and simple. While they are in form enacted under the police power of the state, they are in fact, not directed at any evil which the police power can properly remedy. These statutes do not aim to correct evils which threaten the public generally. Their purpose merely is to build up the trade and business of one class or kind of dealers at the expense of another and different class of dealers. These statutes are for the purpose of doing away entirely with the competition of outside, non-resident dealers who sell directly to the consumer. The legislatures of the various states are besieged by individual dealers and associations, which represent local dealers who sell goods from their stores or fixed places of business. They draft laws for their own business protection and urge their passage. No one being on hand to oppose such laws, the legislatures yield easily to the importunities of these dealers and their associations, and pass these laws for the stifling of their competition and the protection of their trade and business.

That this history and purpose is behind all these statutes, it is comparatively easy to demonstrate. In fact, it is a matter of common knowledge, well known and thoroughly understood by all who have the least familiarity with the

subject. The information on which this knowledge is based is published broadcast over the country with little apparent effort at concealment. We shall add nothing to the publicity of it by repeating some parts of it here. To show that such is the history and purpose of all these statutes, we shall quote from the decisions of courts of last resort, from opinions of judges, from published reports of proceedings of dealer's associations or conventions, from editorials in trade journals, from news items and newspaper articles, from speeches and addresses by prominent dealers and their officers before their conventions, all of which show conclusively that local dealers and their associations formulate and prepare drafts of peddlers' license laws which they submit to their respective legislatures and procure their passage, and then proceed to enforce them for the sole and only purpose throughout, of building up their own business and of doing away entirely with the competition of those who sell goods in any different manner from their own. What they are attempting to correct is not in any sense a public evil, but only what they themselves call a trade evil, and the problem which they claim they are attempting to solve is a limited and narrow one. They assert that they are trying to reach only those large concerns which affect trade in general, and that they have no concern about the small, irresponsible peddler who carries a pack and whose business is, therefore, small and insignificant. The only man whose business really needs regulation, they entirely ignore. We quote from an article which appeared in a trade paper dated December 3, 1910 published at Spokane, Washington, called the New West Trade:

> "While this is not the time of the year when peddlers are most active, the fraternity will be plying vigorously again a few months from now, and the operations of certain classes of

peddlers are of such a nature and magnitude as to make the problem one of considerable seriousness to the more regular and established forms of merchandizing. * * * The writer has no particular quarrel with the small foot or pack peddler, and believes that most county merchants are of like mind. These fellows work hard for what they get, and their operations do not materially affect the general flow of trade. We are concerned only with those large scale peddlers whose methods and operations tend to question the necessity and economy of the existing system of distribution and where questions of trade ethics and home trade are involved."

These laws are particularly directed against those who sell direct to the consumer through their own traveling agents, and who cut out entirely the middleman or local dealer or store-keeper. The apparent principle underlying these laws seems to be that a manufacturer has no right, either moral or commercial, to sell his product directly to those who wish to use it; that he must sell his product only to those who deal in such goods and who themselves desire to retail such goods in turn to the actual consumer. The reason is not that the articles which he sells are harmful or injurious, nor that the manner or method of their sale is detrimental to the public, but only that it injures the business of a certain class or kind of dealers or store-keepers who have the prohibited articles for sale in their stores or warehouses.

Almost all the states, at least practically all of the western states, have statutes of this sort. They vary somewhat in their phraseology and in their terms and conditions, but the history and purpose of each of them is precisely the same. We will take them up in detail and at some length.

## Oregon.

The earliest statute passed in Oregon on this subject (Sections 3876-77 Bellinger & Cotton's Code of Ore.) required a peddler to pay a license fee of not less than $10.00 nor more than $200.00, but expressly exempted any goods or produce manufactured or raised within the state.

The Legislature of Oregon in 1903 passed another law (1903 Laws of Ore. p. 77) fixing the license fee at not less than $10.00 or more than $50.00 per quarter, and until fixed by the County Court, the license should be $50.00 per quarter. This statute exempted goods manufactured within the county or any produce raised within the state.

In 1905, the Legislature of Oregon passed another statute (1905 Laws of Ore. p. 339) fixing the license fee for peddlers or itinerant vendors at not less than $200.00 per year or more than $500.00, and until fixed by the County Court, license should be $200.00. This act applied only to those who sold buggies, stoves and fanning mills.

The purpose of all this legislation and the direct interest of the local dealers is easily shown. Two salesmen of the Spaulding Manufacturing Company were arrested in Wasco County, Oregon, for the violation of this statute. While their case was still pending before the Supreme Court of Oregon, there occurred a meeting of the Oregon Hardware and Implement Dealers' Association at Portland, Oregon, January 19, 1909. We quote from the published address of President Altnow of this Association, which report appeared in Farm Implement News published in Chicago, dated February 4, 1909. This trade paper circulates weekly it is claimed among 10,000 merchants and dealers.

> "Two convictions of buggy peddlers have been secured by members of our association

and the parties were fined $300 each. These cases have been appealed to the Supreme Court and the decision of that court is looked for with a great deal of interest, not only by the hardware and implement dealers in this state, but in other states as well. Stove peddlers have been arrested but not tried for the reason that these cases are waiting the results of the ones now pending in the appellate court. If the lower court is sustained, all of the parties arrested will plead guilty and thus will end the peddler and trailer question, as far as it relates to our state.

We have taken the initiative of having a law which, if constitutional, will be of great benefit to the trade all over this country. I wrote to the prosecuting attorney, in the cases appealed, that we were willing to aid him in any way, so far as in our power, to prosecute these cases to a final and successful termination and tendered him the assistance of our association."

We also quote from the published report of Sec. W. P. Baldertson of the same Association on the same occasion as it appeared in the same periodical:

"Following President Altnow's address Secretary W. P. Baldertson rendered his report. He reviewed the progress made by the association during the past year, showing what has been done to abate the peddler nuisance as well as other matters distasteful to members of the association. Six grievances had been adjusted during the year and Mr. Baldertson believed that in each case a permanent understanding was reached. He said hardware and implement jobbers had showed their readiness to co-operate with the retailers in bettering conditions and they showed their good faith by sharing the expense of the legal fight brought against peddlers."

We also quote from the The Hardware Trade of February 9, 1909, a bi-weekly trade journal published in Minneapolis which claims a circulation of more than 4,000, as to the report of Sec. Balderston at the some convention.

> "Following the President's address, W. P. Baldertson, secretary of the association, reported all branches of the work in a healthy condition and that twenty-five members had been added to the membership during the year. The most important piece of work undertaken by the association during the year is a test case of the Oregon Peddlers' License law. Two men were arrested and convicted of peddling buggies in Wasco County. The case has been appealed to the Supreme Court of the state, and the association has engaged able counsel to assist the prosecuting attorney. Mr. Balderston urged that the association support this action in every way possible, and the members responded by voting that the Executive Committee be empowered to use its discretion and aid members wherever possible, in the prosecution of peddlers, by engaging special attorneys, if necessary."

Further, as showing the connection of the Oregon dealers and their Association with the law, we quote from the published report of the secretary of the Inland Empire Implement and Hardware Dealers' Association held at Spokane, January 20 and 21, 1909. (The Hardware Trade, Jan. 26, 1909, p. 21).

> "Oregon has a peddlers' license law. Two agents of the Spaulding Manufacturing Company were recently arrested for violation of this law and were fined by the courts in Wasco County, Oregon, $300.00 each. The case was appealed to the Supreme Court of Oregon, and it will come before that court February 1st for

a final decision. The final decision in this case will have great bearing on the validity of the peddlers' license laws which have been passed through the association's effort in Oregon as well as in Idaho, and should serve as a valuable guide in framing a similar law for this state."

This statute was declared unconstitutional and void by the Supreme Court of Oregon in the case of *State vs. Wright*, 100 Pac. 296, on the ground that it was plainly class legislation and because it was purely arbitrary, permitting one person to perform acts without penalty for which another under similar circumstances was punished. That the vehicle dealers of Oregon and their associations instituted the above case appears plainly from the following editorial which appeared in Farm Implements of April 30, 1909, a monthly trade magazine published in Minneapolis claiming more than 7,000 circulation.

*"Oregon Peddlers' License Bill Void.*

The Supreme Court of the State of Oregon has declared the peddlers' license law of that state to be void, because it is arbitrary and class legislation, the court holding that the law discriminated between peddlers, specifying that peddlers of certain articles should pay a license, and not requiring all peddlers to do so. The case was carried to the highest court by the Spaulding Manufacturing Company of Grinnell, Iowa or its representatives, the law having been upheld by the lower courts. The Oregon Retail Hardware and Implement Dealers' Association brought suit originally, to prevent the agents of the Spaulding concern from peddling vehicles through the state."

In 1909, the Legislature of Oregon passed another statute on this subject (1909 Laws of Ore p. 386) which requires a graduated annual license fee from $25.00 to $300.00,

and in addition thereto, each peddler must make a special deposit of money with the County Treasurer equal to the amount of the license fee which he is required to pay. This statute enlarges the ordinary definition of a peddler to include one who goes about from place to place "selling or offering to sell for future delivery by sample or catalogue at retail to individual purchasers who are not dealers in the articles sold, any goods, wares or merchandise." It will be observed that this statute covers only those sales made directly to users or consumers, and the purpose is perfectly obvious to protect store-keepers and dealers from the competition of those who sell directly to the ultimate consumer. This statute has already been before the Federal Court for examination. See *Ex parte Martin*, 180 Fed. 209. In this case, a salesman was arrested under this law for engaging in strict interstate commerce. The Federal Court, however, preferred to avoid responsibility in the matter, and dismissed the writ of habeas corpus on the ground that the State Courts should first have an opportunity of declaring the enactment unconstitutional. At the hearing of the case of *Ex parte Martin*, an attorney appeared for the state, who admitted that he had been employed by the Retail Dealers' Association to draft the statute in question, and that he had, therefore, prepared and submitted a law which the Legislature had enacted. He was, therefore, employed to assist the District Attorney in enforcing the statute and in having its validity sustained. That the dealers of Oregon drafted and secured the passage of this law, we quote from a news item which appeared in The Hardware Trade of March 23, 1909:

> "Following is a synopsis of Oregon's new peddlers' license law, which was obtained partly through the instrumentality of the Oregon Hardware & Implement Dealers' Association."

We also quote from an editorial in The Hardware Trade of July 27, 1909 entitled "An Active Association" in which the various efforts of the Oregon Retail Hardware and Implement Dealers' Association are referred to and commended, and the editorial continues:

> "Just now the association has a fight on its hands in the enforcement of the peddlers' law and prosecution of individuals who have violated it."

The Oregon Retail Hardware and Implement Dealers' Association held their convention in Portland on January 24, 1911. The Hardware Trade of February 21, 1911 (page 80) prints the report of the proceedings from which the following is quoted:

President Garnett was enthusiastically received and spoke as follows:

> "After one of the most prosperous years in the history of our state, I greet you. Three years and much money has been spent trying to get a law to compel foreign corporations to pay a license to use our highways to peddle buggies and ranges, and some day men will be put in these offices so as to say that such a tax or license is lawful and must be obeyed."

The Weekly Implement Trade Journal in its issue of December 30, 1911, gives an elaborate write-up of the Association Boosters from which the following is taken relating to Henry J. Altnow, Secretary of the Oregon Retail Hardware & Implement Dealers' Association:

> "To him is also due the passage in the Oregon Legislature of the peddlers' license law which same law was passed by the state of Washington after the Oregon law became

operative. If the supreme court of the United States sustains this law, it will prove one of the best measures ever passed by any legislative body for the hardware and implement trade."

## Colorado.

Colorado has an early statute (Mills Ann. St. Sec. 2823, 2828, 2829) which exempted persons who sold commodities manufactured or raised by themselves within the state. This statute was, of course, declared unconstitutional and void. See *Ames vs. The People*, 25 Colo. 508, 55 Pac. 725.

In 1905 the Legislature of Colorado passed an itinerant vendors' act (Colo. Sess. Laws 1905, p. 274) imposing a graduated license tax up to $250.00 per year, but it exempted certain articles from its operation and did not apply to agents selling to merchants in the usual course of business. This statute was declared unconstitutional and void in the case of *Smith v. Farr*, 104 Pac. 401. The Supreme Court of Colorado in its opinion says, p. 404:

> "None of the conditions which would authorize the state to impose the license fee provided are present. Its police power is not involved. The vehicle which plaintiff in error sold was not dangerous nor injurious to health or morals; neither does the law purport to be one providing for inspection of manufactured articles brought into the state for the purpose of sale to consumers, or the levy of a tax thereon as part of the mass of property therein. On the contrary, when reduced to its final analysis, the license exacted is nothing more or less than a tax imposed upon outside manufacturers for the privilege of selling their products in this state direct to the consumer, for the reason that manufacturers within the state are relieved from that burden. Such a law clearly violates the provisions of the federal Constitu-

tion, which counsel for plaintiff in error have invoked. * * *

The act exempts from its operation commercial travelers or agents selling to merchants in the usual course of business. This is a discrimination without any reason. An itinerant vendor, as defined by this act, may, without license, travel from place to place carrying with him manufactured articles to sell to merchants while another carrying the same article and traveling in the same way is inhibited from disposing of his wares to the consumer direct unless he has paid a license fee for the privilege of making such disposition of his property in that way. A burden is imposed upon one itinerant vendor from which another is exempt. We can see no reason why one selling to the merchant may do so without paying a license fee while another who sells the same article to a farmer, must pay that fee. In short, under the statute, one may enjoy a right which is denied another within the same jurisdiction in like circumstances. * * * It is true that the act is entitled an act "to prevent and punish fraud in sales of manufactured goods, wares and merchandise by itinerant vendors, and to regulate such sales"; but the title of an act is not conclusive. Its purpose must be determined from its effect. The police power of a state cannot transcend the fundamental law, and cannot be exercised in such manner as to work a practical abrogation of its provisions. *Railroad Co. v. Husen, supra; State v. Chittenden,* 127 Wis. 468, 107 N. W. 500. So that while it is the province of the General Assembly to determine in what instances the police powers of the state may be exercised, it is the province of the courts to determine whether or not an act based upon the assumption of such power is valid. In order to sustain legislation as a police measure, it must appear, as a general rule, that it tends in a measure to protect the public from some manifest evil.

*State vs. Ashbrooke,* 154 Mo. 375, 55 S. W. 627, 48 L. R. A. 265, 77 Am. St. Rep. 765. Classification adopted for legislative regulation, as held by the Supreme Court of the United States, in *Gulf, Colo. & S. F. Ry. Co., v. Ellis,* 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." *Seaboard Airline Ry. Co. v. Simon,* 56 Fla. 575, 47 South. 1001, 20 L. R. A. (N. S.) 126 *Connolly v. Union Sewer Pipe Co., supra.* If the purpose of the act and classification was to prevent fraud, why should itinerant vendors be permitted to sell to merchants and not to consumers? Or, waiving this, if the purpose was to prevent fraud and protect consumers, why should not the person maintaining a permanent place of business in the state, but who travels about or sends his agents through the country, be permitted to sell to consumers in this way without having obtained a license, and one who maintains no permanent place of business in the state be required to pay a license fee for the privilege of selling in the same way? There is just as much opportunity for fraud and deceit in the one case as the other. In short, the act with respect to the class of vendors under consideration, does not tend to prevent fraud, and the classification made bears no reasonable or just relation to the object indicated by its title, but is merely arbitrary the effect of which is to discriminate in favor of residents of this state, and impose burdens and obligations upon non-residents dealing in the same class of manufactured articles and seeking a market in the same way. * * * *"

That the implement and vehicle dealers and their associations were interested in securing and enforcing this statute we quote from an address before the Colorado Re-

tail Implement Dealers' Association at Denver, March 8, 1910. The address was delivered by H. J. Hodge, Secretary of the National Federation of Retail Implement and Vehicle Dealers' Associations. (Farm Implement News Mch. 17, 1910.)

> "In your state your Association has been active in securing the enactment of a Peddlers' License Law. This, as I understand, has been declared unconstitutional, as have most of the Peddlers' License Laws which have thus far been enacted by the several states. * * * I take it for granted that your Association will continue to push this legislation and try to place upon the statute books a law which will afford the residents of the State of Colorado as well as the dealers some protection against itinerants."

A good illustration of the pernicious effects of association activity is given in the recent case of *Denver Jobbers Assn. vs. People,* 122 Pac. Rep. 404 (Colo.) which shows in detail a horrible example of business conditions when associations of local dealers have their own way, resulting in oppression, unrestrained monopoly, prices raised and business and liberty throttled.

In 1911, the Legislature of Colorado passed another transient dealers' act (1911 Session Laws of Colorado, Chapter 219, p. 632) which defined a transient dealer as one "who engaged in the business of traveling about carrying or conveying with him for sale and selling, manufactured goods, manufactured wares or manufactured merchandise, so carried or conveyed with him for sale." The act imposes license fees varying from $15.00 to $125.00 per year, depending on his method of travel. Violations are punishable by fine or imprisonment or both.

The following is copied from the New West Trade, a Spokane trade paper, dated May 27, 1911:

> "Colorado merchants through their associations have just completed a very successful legislative campaign. In the session of the state legislature just closed they secured the enactment of a garnishment bill * * * transient dealers bill. * * * The excellent legislative record made by the Colorado merchants is another demonstration that associated effort, well directed, will accomplish results."

The Colorado Hardware and Implement Association held a meeting at Denver, Colorado, which was reported in the Hardware Dealers' Magazine of March 1911, page 586j. The following is an extract from this report:

> "During the course of the session, it developed that needed legislation would be urged upon the State Legislature in order to protect the dealers from irresponsible debtors. Counsel will be employed by the Association in order to get an effective itinerant vendor law on the statutes."

The Farm Implement News of March 7, 1912 (page 18) gives a summary of the proceedings of the convention of the Colorado Retail Hardware and Implement Dealers' Association, held in Denver, February 19, 1912. The following is an extract from the published account of the Secretary's report:

> "Legislation.—Shortly after our last convention your legislative committee, too, consisting of President J. H. Linder, of Golden; A. A. Ferguson, of Loveland; Preston Day, of Castle Rock, and your secretary, met in Denver. After looking the ground over, consulting with other dealers, legislators and officers of the retail merchants' association (butchers and grocers) we concluded the

best thing we could do was to have drawn a peddlers' license bill and concentrate our efforts on it. We also agreed with the retail merchants' association to co-operate with them on certain bills of mutual interest, and they to help us on our peddlers' bill. This plan was carried out. I will not burden you with all the details of our work, but assure you it was not the easiest thing in the world to pass some bills we wanted and prevent others which were obnoxious.

Our transient dealers' bill was passed without amendment and is a law. It provides that a peddler (outside of municipalities) shall take out a license for a year (no less) in each county where he peddles. The fee for each county ranges from $15 to $125, according to the mode of travel. This law is not as radical as the old "itinerant vendor's" act of some years ago, which was declared unconstitutional by the supreme court but it is better than nothing, and we think it will be held constitutional. * * *

I call your special attention to the above mentioned transient dealers' bill. I have a copy with me and will be pleased to give you any further information. I think if our members will watch for peddlers and prosecute offenders they will find it pays. I have heard the range peddlers are again working in certain sections. Perhaps some can inform us regarding this."

The Denver Chamber of Commerce News Bulletin, in its issue of July 1912 (page 8) contains the following:

*"Colorado Law on Transient Merchants.*

The Question is often asked: "Why can't we pass a law that would prevent the transient merchant from coming into the city to engage

in business for a short period of time? As a matter of fact, there is now on the statute books of Colorado a law directed at that very thing, but the Colorado Supreme Court, in which the law has repeatedly been contested, has declared it to be unconstitutional. An examination of this law and the opinion of the Supreme Court, in which the law is declared to be unconstitutional will clearly show what a serious stumbling block lies in the way of any effort to abolish the transient merchant evil through legislative measures. '(Quoting from the statute and the court's opinion).

A committee of the Retail Association composed of Messrs. George W. Gano, chairman; E. L. Scholtz, H. L. McWhorter, M. D. Barnett, A. D. Lewis, H. C. Jones, Henry Broadhurst, F. Morgan. Fred F. Syman, Meyer Neusteter, F. P. Allen, H. M. Stoll and C. A. Kendrick, is now at work in an earnest endeavor to devise some plan looking to the protection of the local merchants against itinerant merchants, peddlers, and those who sell from sample lines at the hotels. The very personnel of the committee insures that the matter will be gone into thoroughly and if a satisfactory solution is reached it will be sought after by every city in the country, for it seems that the merchants everywhere are grappling with the same proposition."

## Utah.

The Legislature of Utah passed a Peddlers' law in 1907 (1907 Laws of Utah, p. 124) by which peddlers of a specified list of fifteen or twenty articles were required to pay a license fee of $500.00 a year. The statute applied only to those who went about from place to place selling or offering for sale by sample any of the specified articles to users or consumers. This statute was before the Supreme Court of Utah in the case of *State v. Bayer*, 97 Pac. 129, and the en-

actment, was declared unconstitutional and void. In the course of its opinion, the Supreme Court says, p. 131:

> "Now it is apparent that under the pretense of exercising a police power or of adopting a revenue measure the Legislature passed the act for the mere benefit of local and domestic dealers."

Further on p. 132, the court says:

> "We are well satisfied that the act has no such relation to the public health or morals as will sustain it as a police measure. Nor can it, because of illegal discrimination as to property and persons, be upheld as a revenue measure. We think it repugnant to the provisions of the Federal Constitution that no state shall abridge the privileges or immunities of the citizens of United States nor deny to persons within its jurisdiction the equal protection of the laws."

## Wyoming.

The Legislature of Wyoming in 1907 passed an itinerant vendors' act (1907 Sess. Laws of Wyo. p. 49) requiring a graduated license fee up to $300.00 per year, but this act exempted certain specified articles and did not apply to agents selling to merchants within the state in the usual course of business.

In 1909, the Legislature of Wyoming enacted another statute relating to itinerant vendors. This statute re-enacts the 1907 law, but increases the license fee for certain classes of vendors. It retains the exemption, however, of a certain list of specified articles and of those agents who sell to merchants in the state in the usual course of business.

The Wyoming law as it now stands is almost a literal

copy of the Colorado law which was declared unconstitutional and void by the Supreme Court of Colorado in the case of *Smith v. Farr*, 104 Pac. 401.

In a little different line, the legislature is attempting to accomplish the same result by other methods. The Legislature of Wyoming in 1909 passed a law (1909 Laws of Wyoming, Chap. 98, p. 145) relating to itinerant vendors, which provides that auctioneers, whether permanently located or not, or any one who sells at auction, any goods which have for two years immediately preceding paid an annual tax for state and county purposes, shall pay a license of $60.00 per year. All other persons who sell goods not so taxed, shall pay a license of $300.00 per year.

The Legislature of Wyoming in 1911 passed a sweeping law which apparently makes it impossible for any person to sell any goods, either at public or private sale, without paying a license. It provides that "no auctioneer, peddler, or other person or persons, company or corporation, shall be permitted to sell, convey, barter or retail, either at private sale or public auction any goods, wares or merchandise without first having obtained a license therefor", but does not apply to auction sales of live stock in cities or towns or to public sales held by farmers upon the farm. (See 1911 Laws of Wyoming Chap. 21 p. 24).

## Arkansas.

By an old statute enacted in 1885 (Kirby's Ark. Dig. Sec. 6876) a peddler was defined to be one who went about from place to place selling goods of any description other than articles grown, produced or manufactured by the seller himself or those in his employ, and a license tax of $25.00 for a term of six months or less was levied upon him. By Kirby's Ark. Dig. Sec. 6878, a tax of $100.00 is levied upon each

and every clock peddler, each and every agent for the sale of lightning rods and stove range agents doing business in the state, for a term of one year or less. This statute was declared to be unconstitutional and void in the case of *Hynes v. Briggs*, 41 Fed. 468.

In 1901 the Arkansas Legislature passed another statute relating to this subject (Kirby's Ark. Dig. Sec. 6886) requiring a license tax of $200.00 per year upon peddlers of four or five specified articles. This statute contained the proviso that it should not apply to any resident merchant within the county. This statute was held unconstitutional in the case of *Ex parte Deeds*, 75 Ark. 542, 87 S. W. 1030.

In 1905, the Legislature of Arkansas passed another statute (1905 Acts of Ark. p. 469) Sec. I of which is as follows:

> "It shall be unlawful for any foreign person or foreign corporation to swap, trade or traffic in horses or mules in this state, or to peddle organs, stove ranges, pianos or vehicles, without first paying a license of $100.00 in each county in which they do said business; provided, this Act shall not apply to any horse or mule trader except such as travel through the country carrying their camping outfits, and who camp on the public domain."

The 1905 Legislature also passed another statute (1905 Acts of Ark. p. 806) affecting peddlers in certain specified counties who sold certain enumerated articles, but which provided that it should not apply to a resident merchant with a fixed place of business within the counties affected. This statute levied a license tax of $300.00 from date of issue to the succeeding January 1st. These statutes, being plainly unconstitutional, were in various instances held invalid by inferior judges, no case involving these statutes having reached the Supreme Court.

In 1907, the Arkansas Legislature passed another statute (1907 Acts of Ark. p. 1171) to regulate peddling in Johnson County, Arkansas, and required a graduated license fee up to $200.00 per month, and it exempted certain articles from its provisions and did not apply to traveling salesmen taking orders for future delivery.

In 1909, the Arkansas Legislature passed the statute now under consideration (1909 Acts of Ark. p. 292) and under which the case of *Byles vs. State of Arkansas*, 126 S. W. 94 arose. While that case was pending in the lower courts and just after Chancellor Martineau declared the 1909 Arkansas statute unconstitutional, the following editorial appeared in the Farm Implement News, a weekly trade periodical circulating, it is claimed, among more than ten thousand implement and hardware dealers. We quote from the issue of this paper dated August 5, 1909, page 12:

*"Another Peddler Law Killed.*

> The decision recently rendered by an Arkansas judge holding the peddlers' license law enacted in that state last winter to be unconstitutional emphasizes the folly of seeking legislation which imposes a tax on certain classes of peddlers and allows others to operate without restriction. In this case the law required vehicle trailers and peddlers of ranges and a few other articles named to pay an annual fee of $200. The court declared the law unconstitutional because it levied a tax against peddlers of certain articles and not against peddlers in general. This made it apparent, the court said, that the tax was not levied as a revenue producer, but for the purpose of restricting trade in certain commodities. It did not hold that a peddler's license could not be required, but that certain articles could not be

discriminated against under the guise of a license law.

Similar decisions have been rendered by the courts in several other states. The implement and hardware trade is entirely justified in seeking legislation to protect them from the competition of peddlers who pay no taxes nor contribute in any way to the support of public institutions, but apparently the dealers are wasting their time in pushing bills which single out certain classes of peddlers for taxation.

We have faith that the dealers' National Federation, with the co-operation of the manufacturers' associations and individual manufacturers who are opposed to trailing and peddling, will in the near future be able to draft a law which will stand the test of the courts. This is one of the subjects that has been given a foremost position in the Federation's calendar and the dealers may rest assured it will not be abandoned as long as there is the slightest hope of securing the desired legislation."

When that case came on for argument before the Supreme Court of Arkansas, an attorney appeared named M. E. Dunnaway of Little Rock, Arkansas, who claimed that he represented the Arkansas Vehicle and Implement Dealers' Association which was interested in the passage of this law and was interested in sustaining it, and he desired the postponement of the oral argument until he could prepare and file a brief in the case. The Supreme Court of Arkansas refused to postpone the oral argument, but did allow him, as representing this Association, to participate in the oral argument on their behalf.

After the decision of the Supreme Court of Arkansas in that case sustaining the 1909 Law, numerous trade papers commented on the case, among which we quote a comment from the Farm Implement News, dated April 21, 1910, p. 13:

*"The Arkansas Peddler Law Decision.*

> The non-conformity of opinion of various state Supreme Courts is exemplified by the decision of the Supreme Court of Arkansas which a few weeks ago sustained the peddler law enacted by the legislature last year, a law that is almost a counterpart of others that have been held unconstitutional in other states. The decision is a great victory for the Arkansas Retail Hardware Association and a boon to all Arkansas dealers, but contains little encouragement for those of states whose courts have rejected similar measures. The decision was rendered in the case of a buggy trailer who peddled vehicles without a license."

Similar comment appeared in other trade papers, and we quote also from Farm Implements dated April 30, 1910:

*"Arkansas Peddler Law Sustained.*

> The Supreme Court of the State of Arkansas recently rendered a decision sustaining the peddlers' license law passed at the last session of the legislature. The action was instituted by the Arkansas Retail Hardware Association, in the case of a peddler trailing vehicles through the state and selling without a license. The law provides that a fee of $200 shall be paid for the privilege of selling in that manner, to the County Treasurer of each county in which the peddling is done. The license is good for one year. Laws very similar to this have been held unconstitutional in some of the other states and the retail dealers of Arkansas are highly gratified with the decision of the Supreme Court upholding the constitutionality of the statute."

The Legislature of Arkansas in 1911, passed a statute (1911 Acts of Arkansas, Act 334, p. 307) which amends the law so as to give the privilege of peddling without license,

among other privileges to disabled soldiers or sailors and to all blind persons, provided they are residents of the state of Arkansas. The same Legislature in 1911, passed another statute (1911 Acts of Arkansas, Act 372, p. 347) which bears upon the same question as to placing burdens upon producers selling their own products. This statute makes it "unlawful for any city council, member of an incorporation, corporation, city officer, or any other person, either in an incorporated city or elsewhere to hinder or to interfere or to impose a tax or a license or to obstruct in any manner whatsoever any person in the selling or the offering for sale, any fruits, vegetables, or any products of the farm, including meats from domestic animals or live stock. The benefits of this act accrue only to those who produce the above mentioned articles of produce and offer them for sale either in person or through a legally authorized agent." This act was made effective from the date of its passage as being emergency legislation necessary for the immediate peace, health and safety of the people of the state of Arkansas.

The Spaulding Manufacturing Company in January 1912 commenced a suit in equity in the Federal Court at Little Rock, Arkansas, to enjoin the Prosecuting Attorneys throughout the state from enforcing against them the law now under consideration. This case is now pending in that court. When the case was first commenced, the following appeared in the Arkansas Daily Gazette of February 4, 1912:

> "Hardware Men to Join with State. Association Will Fight Effort to Put "Peddler's" Act on the Shelf.
>
> Upon his return last night from a two weeks business trip in northern and Western Arkansas, Grover T. Owens, secretary of the Arkansas Retail Hardware Association, announced that the association as a body would

enter a vigorous protest to prevent the Spaulding Manufacturing Company escaping what is known as the peddler's tax through federal injunction.

Following the passage of the peddling act of 1909, which imposes a tax of $200 for each county in which goods are sold from samples, the Spaulding company sought to defeat the tax through federal court injunction. Mr. Owens said members of the association are making a united effort to assist the prosecuting attorneys in each county to prohibit what the association terms the "illegal sale of buggies and carriages."

The Hardware Dealers' Magazine of June 1912 (page 1303) has a short summary of the work of the Alabama Retail Hardware Dealers' Association, held at Mobile, May 14th, from which the following is quoted:

"E. E. Mitchell, Morrilton Ark., was present and spoke concerning the peddlers' license in vogue in his state. He remarked that the fee of $200 was proving a good thing, and suggested that the Alabama dealers take up the matter."

In the Farm Implement News of May 2d, 1912 (page 25) is an article entitled "On The Trail of the Trailers", from which the following is a partial quotation, although the facts stated are not accurate:

"Every dealer who has been subjected to the unfair competition of the vehicle trailer recognizes the importance of peddlers' license laws. Every such dealer will hail with delight the recent decisions of high courts upholding laws which require itinerant salesmen of the peddler and trailer type to pay a license fee for the privilege of pursuing their calling. The deci-

sions to which we refer are of the utmost importance, for they point the way to universal legislation similar to that which has stood the legal test."

The article then goes on to refer to the Washington statute and the Arkansas statute and continues as follows:

"The supreme court's approval of the Washington statute is replete with suggestion to the dealers' associations, and we venture to predict renewed activity among these organizations. So many state laws governing peddling and trailing have been rendered invalid by high state courts that the dealers' associations had almost lost hope of getting through one that would stand the test. In some states the judiciary committees of legislative bodies have refused to consider peddlers' license laws in recent years because laws formerly enacted were not sustained by the supreme court. With the United States Supreme court's approval of the Washington law a matter of record (sic) it probably will not be difficult to get a reopening of the subject in many legislatures. A bill for an act like one that has stood the acid test necessarily must receive consideration. Good advice to the dealer whose trade suffers from the operations of the vehicle trailer runs something like this. If you belong to a dealers' association, insist that it begin an agressive campaign looking toward anti-trailer legislation in your state. If not already a member of such an organization, join one and start something along the line mentioned. The trailers are on the run; keep 'em going."

WISCONSIN.

The Legislature of Wisconsin in 1905 passed a statute relating to hawkers and peddlers and other occupations (1905 Laws of Wis. c. 490) by which each transient mer-

chant was required to pay in the State Treasury $75.00 and in addition such further amount, as may be required by city ordinance of the place where business is conducted, not exceeding $25.00 per day. This ordinance was held to be unconstitutional and void because plainly unreasonable and prohibitive. See *Ex parte Eaglesfield,* 180 Fed. 558.

The Wisconsin Retail Implement and Vehicle Dealers' Association met in Milwaukee December 13, 14 and 15, 1910. Regarding the work of the National Federation of Implement and Vehicle Dealers' Associations and regarding the work of the Wisconsin Association in connection with peddlers' license, we quote from the report of Secretary Ewen given before this Association as it was published in Farm Implement News of December 22, 1910, p. 18:

> "It was the desire of the delegates to the Federation meeting that this association put forth its best efforts to secure the enactment of a peddlers' license law that will be some protection against the inroads being made into the trade of the regular dealers, and to that end Secretary Hodge sent me a copy of a bill that was introduced in the Kansas legislature in 1908, and will be again introduced at the next session of the legislature. This matter should be talked over and some action taken in regard to it."

Address before Minnesota Retail Implement Dealers' Association by F. R. Sebenthall, Vice President of the National Federation of Retail Implement and Vehicle Dealers' Associations and Secretary of the Wisconsin Retail Implement and Vehicle Dealers' Association. (Farm Implement News, January 18, 1912, page 23.)

> "Power of the Federation.—As an illustration. Two years ago a line of retail stores was put in by one of the leading jobbing

houses in Omaha. They started about thirty-five of these branch stores. The matter was taken up by the retail dealers in the towns where these stores were located and complaints made to the state associations in Iowa and Nebraska. In Iowa the association found it was not big enough to handle the situation, and the Nebraska association found itself in the same position. So the matter was passed up to the National Federation and at one of the sessions of the federation the head of the offending house was called to Chicago to talk the matter over. He came and found there the representatives of 12,000 retail dealers who stood firm on the proposition that the branch house idea was wrong and should be stopped in the interests of general trade. The result was as might have been expected. Not only was the plan of establishing these branch houses abandoned, but instructions were sent out to discontinue the branches which already had been installed, with the result that the management of that house has been discontinued. Similar work can be done for every association by the Federation. The manufacturers always are ready to work with the retail dealers in eliminating those feautres about which complaints are made and I am happy to say that not a single complaint was made in our state of Wisconsin last year.'

## Texas.

Texas has a peddlers' statute passed in 1899 (Laws of 1899, p. 201, c. 116) by which peddlers with various means of locomotion are required to pay a graduated license tax from $5.00 to $10.00 annually, but exempting vendors of certain articles entirely. This act also imposes an annual license tax of $200.00 on the peddling of six enumerated articles (including buggies). At every session of the Texas Legislature since that time, efforts have been made to amend

or change this law in the direction of increasing the size of the license fee or increasing the list of articles covered by the statute. So far, however, the effort to change this law has been ineffectual. The statute has been frequently under consideration by the courts of Texas under various phases of the statute. For example, *Ex parte Overstreet*, 46 S. W. 825; *French vs. State*, 58 S. W. 1015; *Kirkpatrick vs. State*, 60 S. W. 762; *Potts vs. State*, 74 S. W. 31; *Harkins vs. State*, 75 S. W. 26. During all of this period, the implement and vehicle dealers of Texas have been active in drafting laws, recommending changes and attempting to secure legislation. To show their active interest, we quote from the published address of Pres. T. H. Shive of the Texas Retail Dealers' Hardware and Implement Association, delivered at Dallas, February 15, 1910: (Farm Implement News, Feb. 24, 1910.)

*"Stove and Buggy Peddlers.*

> You all know the evils and unfairness of the predatory stove and buggy peddler. It is not necessary for me to say to you why the dealer is entitled to the business that goes to the fair-weather friend of the farmer. Our association has given a good deal of time and attention to this matter and succeeded through our legislative committee, headed by Capt. Richardson, in having a law passed which would have eliminated this evil but for one weak point. One amendment to this law will cure this defect, and I believe with anything like a united effort we can have this amendment passed by the legislature. There has been recently passed in the State of Oregon a law which has been declared constitutional by the United States Circuit judge of that circuit. It is now before the Supreme Court of the United States, and if it is sustained there I think if we cannot have our own law properly amended we should make an immediate and strenuous effort to have a similar law passed in Texas."

The Carriage Monthly is a trade paper published at Philadelphia, Pa. In its issue of December, 1911 on page 43, the following appears:

*"The Texas Buggy Peddler Must Go.*

The officers of the Texas Hardware and Implement Association have decided that the energies of the association shall be used to bring about the passage of a peddlers' law which will afford proper protection to the people of Texas. 'We say the 'people' of Texas,' said Henry Marti, secretary of the association, 'because the buying public is hurt by them as well as the dealers.' When a consumer is gulled into paying two prices for a stove or a buggy, he certainly is not being benefited by the transaction. Taking this fact into consideration, it is nothing but fair that the State give some protection to the merchants who pay the taxes which support the state."

The Texas Hardware & Implement Dealers' Association met in Dallas, Texas, March 29, 1912. The following is a quotation from a report of that meeting. (Farm Implement News, April 4, 1912, p. 23.):

"The address of Allen Duncan, of Bartlett, on the necessity for a peddlers' license law, precipitated a discussion in which many took part. Henry Marti declared that it would be an easy matter to draw up the bill for such a law, as several of the states have such laws, but convincing that such a law would be for the good of the country was another matter.

O. J. Rea of Clifton, doubted the propriety of going into politics. He said that everybody, including himself, was out hunting bargains, and that if the peddlers could take business away from him it was his fault. The members however, were by a large majority in favor of a peddlers' license law."

The Hardware Dealers Magazine published in New York, in its March, 1912 issue, (page 540) gives the following summary of the same convention:

> "The fourteenth annual convention of the Texas Hardware and Implement Association will be held at Dallas, March 26, 27, 28. The dealers are in fine fettle largely owing to the bright crop prospects for this year. There will be addresses on Advertising, Salesmanship, Conditions in Fire Insurance Policies, How Costs are Figured, Retail Catalogues, etc. One of the most important matters to come before the meeting will be the launching of a campaign to bring about the enactment of a Peddlers' License Law. Texas dealers have suffered very much by the stove and buggy peddlers getting a large share of their business."

### Washington.

The state of Washington has had an interesting history so far as peddlers' license laws are concerned. The history of this legislation is so well given by Judge Whitson of the Federal Court of the Eastern District of Washington, that we quote from his opinion in the case of *Spaulding vs. Evenson*, 149 Fed. 913 at p. 920:

> "A brief review of the history of this subject will throw light upon the present inquiry. In 1903 an act was passed by the Legislature of this state (Sess. Laws 1903, p. 38, c. 34), which undertook to prohibit the sale of vehicles stoves, ranges, pianos, or other merchandise without a license, and the license fee was fixed at $10. per day but with the proviso that the act should not apply to any person selling any of said articles from his regularly maintained stock or established place of business, when such stock had been maintained in the county for a period of six months. This act was several times held discriminative and void

by superior judges of the state of well-recognized ability but did not apparently reach the Supreme Court; those decisions being generally acquiesced in. While it has been suggested by affidavit that complainants are carrying on business in violation of this law, it was not referred to in argument, and it may be assumed that counsel do not rely upon that point. In 1905 an act was passed to meet the objections to that of 1903 (Sess. Laws 1905, p. 372, c. 177.) It provides that every person, firm, or corporation who peddles out after shipment to the state, canvasses, or sells by sample, etc., shall pay in advance an annual license tax of $200. This act was recently declared void by the state Supreme Court. *Bacon v. Locke* Constable, (Wash.) 83 Pac. 721. *It is a matter of common notoriety that this legislation was enacted at the suggestion and for the benefit of local dealers.* The amount fixed for license by the Legislature was intended to be prohibitive of competition by peddlers. Shortly after the decision holding the act of 1905 unconstitutional, we find the dealers who had attempted to put the peddlers out of business by legislation resorting to the very ingenious scheme which has been here disclosed. It is proposed now to accomplish by subterfuge that which the courts of the state have repeatedly held cannot be done directly." (The italics are ours.)

The case from which this quotation has been made, sheds an interesting light on the dealers' activity in Washington in these matters. The Inland Empire Implement and Hardware Dealers' Association formed within itself a peddlers' association which attempted actively to break up and destroy the business of outside non-resident dealers whenever they should send their agents into the state of Washington to sell their goods. The non-resident salesmen as soon as they appeared, were harrassed and annoyed for weeks and were con-

stantly shadowed day and night; every prospective customer driven away and the work of every salesman seriously interfered with. After this had been kept up for some time, the Spaulding Manufacturing Company went into the Federal Court for an injunction against this organized effort to destroy their business. They secured an injunction *pendente lite* against 166 firms and corporations in Eastern Washington, Idaho and Wyoming. 149 Fed. 913. This decision was affirmed on appeal by the Circuit Court of Appeals at San Francisco. See 150 Fed. 517.

In 1909 the Washington legislature passed another peddlers' License Statute. This statute (1909 Laws of Wash. p. 736) requires peddlers to pay a graduated license of from $100.00 to $300.00, expiring January 1st after date of issue, and in addition thereto, each peddler must make a special deposit of $500.00 in cash with the County Treasurer. It exempts peddlers of agricultural or farm products and vendors of books, periodicals or newspapers. That the local dealers and storekeepers of Washington have directly procured this legislation in order to benefit themselves as a class and shut out competition by outside salesmen, is everywhere admitted and recognized. After the injunction proceeding against the Inland Empire Association, above described, in which it was judicially determined that this Association was attempting by illegal means to drive out competition, we find the following interesting statement in the published report of the secretary of the Inland Empire Implement and Hardware Dealers' Association, rendered at their convention in Spokane on January 23, 1909: (Farm Implement News, Feb. 4, 1909, p. 19.)

> "You all remember the Peddler's Association organized three years ago from among members of this association. This was organized to give competition to buggy and steel

range peddlers and we were very successful until the litigation started by the Spaulding Manufacturing Company came upon us. It was then that our Peddlers' Association was deserted by its members like rats from a sinking ship, except by those who had bills against it. These bills were presented, you may be sure, and had to be paid, and as the funds in the Peddlers' Association were exhausted, the debt had to be borne by this association.

True in some cases, we did not pay cash, but the bills were allowed as credit on dues the same as cash. In addition to bills from our members we were left with attorneys' and court costs amounting to $1,477.50, and this bill the association has paid. This has left us with an empty treasury, whereas, without these bills we would have had a full treasury."

After the Supreme Court of Washington had sustained the validity of the 1909 law, of course, trade papers commented freely on the decision. As a sample, we quote from Farm Implements of October 30, 1909:

*"Peddlers' License Law Sustained.*

Sec. E. W. Evenson of the Inland Empire Implement and Hardware Dealer's Association has notified the members that the Washington Supreme Court has handed down an opinion sustaining the constitutionality of the peddlers' license law passed by the last legislature of Washington. This is an important victory for the Inland Empire Association, and will provide a fundamental principle on which other associations may construct similar laws for other states."

After the 1909 law had been sustained by the Supreme Court of Washington, we find in the published report of the proceedings of the next annual meeting of the Inland Em-

pire Implement and Hardware Dealers' Association, the following significant comment in the secretary's report given at their convention in Spokane, Washington on January 19, 1910: (The Hdw. Trade, Jan. 25, 1910, p. 15.)

> "During the past year the peddler's license law was passed by the Legislature largely through the instrumentality of this Association, and so rapidly do things move that it has already been tested in the courts and the State Supreme Court has held it to be constitutional. The case in which this law is now involved is now on appeal to the U. S. Supreme Court, and this Association should "see the thing through" by supplying able counsel to represent the law before the U. S. Supreme Court. This too can be done through co-operation and if all help the burden will scarcely be noticed by anyone in particular. If your co-operation had done nothing more, your Association would be well worth while."

Other published reports of this convention speak of this matter as follows: (Farm Implement News, Jan. 27, 1910, p. 20.)

> "The afternoon session of the first day was opened with the report of Secretary Evenson, which dealt with the work of the organization during the past year. Mr. Evenson referred to the peddlers' license law which had been sustained by the state Supreme Court in a case which has been appealed to the Supreme Court of the United States, the details of which have been published in the trade papers. * * *
>
> The matter of financing the peddler's license law litigation was taken up and it was the opinion of the convention that an assessement should be levied on all members."

At this same convention, an address was given by Gov. M. E. Hay, a charter member of the Association and for twenty years an implement dealer at Wilbur, Washington, who congratulated them on the work accomplished by the Association and urged them to greater loyalty and effort. It is interesting to note in passing that Gov. Hay was formerly president of the Inland Empire Implement and Hardware Dealers' Association and was very active in its affairs at the time of the injunction proceedings above referred to in the Federal Court reported in 149 Fed. 913. Gov. Hay was one of the members enjoined by that decision.

The Hardware Trade in its issue of February 8, 1910, in its report of the same convention, tells further of the proceedings as follows:

> "Seabury Merritt of Spokane was introduced. Mr. Merritt is the lawyer who has handled the peddlers' license law cases and has represented the Association relative to peddlers' license legislation in the past. He delivered a very interesting address on the law regarding this subject and at the conclusion of this address was thoroughly cross examined by the members relative to the applicability of the present license law. Mr. Max suggested that Mr. Merritt deliver this talk before the Farmers' Convention which would meet at Cour d' Alene in June. A motion was made and seconded and carried that the secretary keep this in mind to the end that Mr. Merritt do so."

After the case of *McKnight vs. Hodge* had been appealed to the Supreme Court of the United States, the Inland Empire Implement and Hardware Dealers' Association made an appeal to all associations, state and national, to assist them in financing the litigation. The expense connected with the hearing of that case was borne by the Inland Empire Im-

plement and Hardware Dealers' Association with whatever help it has been able to secure from other similar organizations. Throughout the trade papers, the secretary of the Association made an appeal to all associations of the U. S. in an open letter which we quote in full from its publication in the Farm Implement News of December 9, 1909:

> "Editor Farm Implement News: We desire at this time to call your early and earnest attention to our Peddlers' License Law. In order that you may intelligently pass upon this subject, we are herewith handing you a copy of this law. A slight history of the same will no doubt be of interest to you and to your readers, particularly those who are interested in association effort.
>
> The Inland Empire Hardware and Implement Association has spent upwards of $3,000 in peddlers' license law legislation and litigation. *We passed a law in 1905* which was declared unconstitutional. Profiting by this decision *we drew another and passed it in 1907*, and this too was declared unconstitutional. The two cases cited above, while in the nature of a temporary misfortune, proved very advantageous to us for it taught us how to draw up a law and how to stop up loopholes. Accordingly, in 1909, the enclosed law was, after much preparation, introduced and passed. *We proceeded immediately to see that it was enforced.*
>
> Attempts were made by vehicle and steel range peddlers to get a test of the law before the Supreme Court of the state under stipulations which made it highly probable that the law would be declared unconstitutional. However, we finally succeeded in securing a test case with one McKnight, a peddler of tooth powder, soap and other toilet preparations. McKnight was arrested in King county for a violation of the law and applied direct to the Supreme Court of the state for an original writ

of habeas corpus. The case was argued before the Supreme Court of the state Sept. 28, 1909, and a decision rendered Oct. 16th, upholding the law.

We have just been advised that McKnight, through his attorney, has applied for a writ of error to the Supreme Court of the state and intends taking his case to the Supreme Court of United States. This is where all the associations in the United States should become interested.

This association thus far has financed all of its own peddlers' license law legislation in this state. We feel, however, that now that the case has become an issue in the United States Supreme Court all the associations in the United States are or should be interested in seeing that the law is upheld. Whether we are beaten in the United States Supreme Court (and we do not expect to be) or whether we are successful, should make no difference so far as the interest of the other associations is concerned. If we are beaten, it will show clearly to all other associations how they should draw up similar laws in order that they may be declared constitutional. To this end we deem it wise that the very best legal counsel in the United States should represent the associations in the interest of the upholding of the law.

The object of this letter is to secure an expression from the officers of the various state associations throughout the United States relative to the matter of financing the expenses of this case in the United States Supreme Court. Anything that you can do to push the good work along will be duly appreciated. (The italics are ours.)

(Signed) E. W. EVENSON,
*Secretary.*"

As a sample of editorial comment in the trade journals following the appeal of this case to the U. S. Supreme Court,

we quote from an editorial in the Farm Implement News dated December 9, 1909:

*"Important Decisions in Prospect.*

> Now comes the news that a peddlers' license law is to be passed upon by the highest court on an appeal from one who was arrested for violation of the law of the State of Washington. Many states have enacted peddlers' license laws only to have them declared unconstitutional by the state Supreme Courts. Repeated efforts have been made by trade associations to draft laws that would stand the test, but none have gone beyond the state courts. The law to be tested was passed at the request of the Inland Empire Hardware and Implement Association and was the third enacted in Washington through the influence of that body.
>
> A decision from the Supreme Court of the United States on either of these cases will be the law of the land. If favorable to the contention of the dealers, the result will be victory of far reaching importance. If unfavorable, the dealers will know that other plans must be tried to accomplish the desired ends. In the peddlers' license law case it is hoped that the highest court, although it may not sustain the Washington law, will indicate by its decision a form of law which would stand the test."

An interesting side light on the Washington situation is in the address of H. J. Hodge, secretary of the National Federation of Retail Implement and Vehicle Dealers' Associations, which he gave before the Colorado Retail Implement Dealers' Association at their convention in Denver, March 8, 1910. The published report of this address contains the following frank statement relating to the Washington situation: (Farm Implement News, March 17, 1910, p. 27.)

"In your state your association has been active in securing the enactment of a peddlers' license law. This, as I understand it, has been declared unconstitutional, as have most of the peddlers' license laws which have thus far been enacted by the several states. I believe that the only statute which has ever been sustained by the United States Supreme Court was that of Missouri, this for the reason that the element of discrimination is entirely eliminated. The Washington law, although making discrimination as to peddlers, has been sustained by the courts of Washington, and it has been appealed to the Supreme Court of the United States. *In view of former decisions, it is gravely apprehended that the Washington peddlers' license law will share the same fate as the laws of other states that have shown this element of discrimination.* I take it for granted that your association will continue to push this legislation and try to have placed upon the statute books a law which will afford the residents of the State of Colorado, as well as the dealers, some protection against itinerants." (The italics are ours.)

An equally frank statement was made by the same officer in his report as secretary before the meeting of the national Federation of Retail Implement and Vehicle Dealers' Associations held in Chicago, October 11, 12 and 13, 1910. We quote from his report as follows: (Farm Implement News, Oct. 13, 1910, p. 22.)

"During the past year, I have received letters and telephone and telegraph messages asking for information concerning peddlers' license laws, and all that could be said in reply was that Missouri is the only state that has a law that has not been attacked in the courts. One other state has a law that the state courts

have held as valid, *but as it contains the same element of discrimination that has been the basis for adverse decisions in other states and in the higher courts, it must be admitted that sooner or later it will be held unconstitutional.* Now our associations are losing valuable time when they delay the agitation of this question. Every association should take the necessary steps at once to place upon the statute books of the state where its members are located a law governing peddling that will afford dealers some protection. It will entail considerable expense, but the results will be worth it. Passing resolutions will not avail anything. There is one locality within the jurisdiction of this Federation where over $10,000 worth of ranges and vehicles have been sold by peddlers since the month of June." (The italics are ours.)

We quote also from the report of the Committee on Resolutions adopted at the same Convention:

"We would also urge that earnest efforts be made to secure effective peddlers' license laws."

The Washington State Grocers' Association held a meeting which was reported in a Spokane trade paper called the New West Trade, October 14, 1911. The following is a quotation from the published account of Secretary Higgins' report:

"Following the instructions of our last convention, held at Walla Walla, I busied myself in preparing for introduction to the legislature and trying to arouse interest in and aid for eight proposed laws in behalf of the retail trade. During my efforts to further these measures I visited and addressed the associations at Aberdeen, Ballard, Bellingham,

Everett, Elma, Montesano and Olympia, and put in several weeks lobbying at Olympia in their interest and striving to prevent harmful legislation. It was ably assisted by Messrs. Rider and Teachnor of Centralia, and Messrs. Koons, Ebert and Holmes of Tacoma, and Mr. Reeder of Olympia and Representatives Minard and Scales and Senator Myers.

With the exception of securing the passage of an act remedying a defect in our garnishment law and defeating two harmful measures, our labors were in vain. Lack of sufficient individual interest upon the part of the masses of retailers, as well as a lack of funds to keep an efficient lobbying committee at work during the full session, was in a large measure responsible for failure to enact several of our bills into law. Several of our members thought we were asking too much and that in the future we should concentrate our strength on a few of the most necessary measures."

Farm Implements, January 31, 1912, page 14, gives something of the history of the Idaho and Washington peddlers' license laws:

"Several years ago Judge Forney was retained by a company manufacturing stoves and ranges to defend their agents operating in Idaho and Washington, who were frequently arrested under the peddlers' license laws of those states for failing to comply with the statutes. Later on, when the implement dealers of Idaho organized, the first president of the association, C. L. Butterfield, of Moscow, requested Judge Forney to draft a peddlers' license law for Idaho, which he did. This law was enacted by the legislature, and when contested was sustained by the supreme court. Subsequently, the Washington legislature enacted identically the same law for that state."

Farm Implement News, February 15, 1912, page 30:

*Supreme Court to Pass on Peddler Law.*

A decision of considerable importance to the retail implement trade is expected from the supreme court of the United States within a few weeks. The case before the supreme court involves the peddlers' license law of the state of Washington. This comprehensive measure prepared by and introduced through the influence of the Pacific-Northwest Hardware and Implement Association, was the subject of a suit in the state of Washington about a year ago. The measure was sustained by the supreme court of that state. The plaintiff, a vehicle and range peddler, has taken appeal to the supreme court of the United States, and the case will be argued either this month or next.

Should the measure be declared constitutional by the supreme court of the United States, no doubt the various implement associations will see that similar bills are introduced into the legislatures of the states within their respective territories. The bill imposes on peddlers a license fee high enough to prevent selling goods at prices with which the established dealers paying taxes and expense of maintaining stores and stocks cannot compete. From the viewpoint of the dealer, it is the best peddlers' law ever written, and, as before stated, it has been pronounced fair, just and constitutional by the supreme court of Washington. We understand also that a duplicate of this measure was passed by the legislature of Idaho and sustained by the supreme court of that state."

Farm Implement News, February 6, 1906, (page 18) contains an article relating to the case of *Spaulding vs. Evenson*, 149 Fed. 913, part of which is as follows:

"At the instance of a committee appointed by the Inland Empire Hardware & Implement Dealers' Association there was passed at the last session of the Washington legislature a law imposing a heavy license upon peddlers of buggies, steel ranges, etc. That law has been declared unconstitutional by the Washington courts. There are similar laws on the statute books of Oregon and Idaho, but they have signally failed to bar the peddlers from those states, or seriously to embarrass these gentry in their operations. It is the opinion of good counsel that any law sufficiently drastic to put the peddlers out of business will be declared unconstitutional by the courts. * * * The retail dealers in eastern Washington and northern Idaho, assisted by the Portland and Spokane jobbers, propose to appeal from the injunction granted by Judge Whitson of the United States district court at Spokane. * * * In this contest the retail dealers of Washington, Oregon and Idaho count upon the moral support of the trade press and hope for financial assistance from vehicle manufacturers, as well as from brother implement dealers farther east, all of whom are, or ought to be, interested in the outcome of this case."

In the Farm Implement News of May 2d, 1912, (page 25), is an article entitled "On The Trail of The Trailers", from which the following is a partial quotation, although the facts stated are not accurate:

"Every dealer who has been subjected to the unfair competition of the vehicle trailer recognizes the importance of peddlers' license laws. Every such dealer will hail with delight the recent decisions of high courts upholding laws which require itinerant salesmen of the peddler and trailer type to pay a license fee for the privilege of pursuing their calling. The decisions to which we refer are of the utmost import-

ance, for they point the way to universal legislation similar to that which has stood the legal test."

The article then goes on to refer to the Washington statute and the Arkansas statute, and continues as follows:

"The supreme court's approval of the Washington statute is replete with suggestion to the dealers' associations, and we venture to predict renewed activity among these organizations. So many state laws governing peddling and trailing have been rendered invalid by high state courts that the dealers' associations had almost lost hope of getting through one that would stand the test. In some states the judiciary committees of legislative bodies have refused to consider peddlers' license laws in recent years because laws formerly enacted were not sustained by the supreme court. With the United States Supreme Court's approval of the Washington law a matter of record (sic) it probably will not be difficult to get a reopening of the subject in many legislatures. A bill for an act like one that has stood the acid test necessarily must receive consideration. Good advice to the dealer whose trade suffers from the operations of the vehicle trailer runs something like this: If you belong to a dealers' association, insist that it begin an aggressive campaign looking toward anti-trailer legislation in your state. If not already a member of such an organization, join one and start something along the line mentioned. The trailers are on the run; keep 'em going."

IDAHO.

The Idaho Legislature passed a law in 1909 (Sess. Laws 1901, p. 155) requiring peddlers to pay a graduated license of from $25.00 to $125.00 a year. This statute included with

peddlers, solicitors taking orders for grocery, hardware or other establishments, but it exempted agents selling goods for wholesale houses and taking orders from merchants only, and it exempted farm products altogether from its operation. This statute was held unconstitutional and invalid in the case of *In re Kinyon*, 75 Pac. 268; see also *In re Abel*, 77 Pac. 621.

Subsequently in 1905, the Idaho Legislature passed another statute (1905 Sess. Laws, p. 97) requiring peddlers to pay a license graded from $100.00 to $300.00 for a period expiring in January succeeding date of issue. Besides the license fee, each peddler must make a special deposit with the County Treasurer of $500.00 in cash. This statute entirely exempts from its operation peddlers of agricultural or farm products. By an amendment to this statute passed in 1909 (1909 Sess. Laws, p. 333) further exemptions are made in favor of honorably discharged soldiers of the U. S. and cripples who are incapable of manual labor. It will be observed that the 1905 Idaho law, which is now in force, is almost precisely like the 1909 Washington law. It is plain that the Washington law is copied from the Idaho law on this subject. The Inland Empire Implement and Hardware Dealers' Association includes among all its members, a large number of dealers in implements and hardware in the State of Idaho, as well as such dealers in Eastern Washington. Many Idaho dealers were directly interested in the case of *Spaulding vs. Evenson*, 149 Fed. 913, already referred to, and many of these dealers were covered by the injunction in that case. The 1905 statute of Idaho is a direct result of the efforts of these local deaers to secure statutes which will do away entirely with the competition of outside vendors. Regarding this fact, we quote from the published report of the Idaho Hardware and Implement Dealers' Association held at Boise, Idaho, December 11th and 12th, 1908. The fol-

lowing is from an address delivered before this association by V. C. Kerr: (The Hardware Trade, Dec. 29, 1908, p. 9.)

*"Peddlers' License Law.*

> I have consulted some of the best legal talent recently relative to a possible amendment to our present peddlers' license law and have been advised that it would be a very difficult thing to have a law enacted that would not be found unconstitutional. So far there is no state in the Union that has succeeded in passing a law on this subject that has stood the test of the courts. Now, if we can have a law enacted that will compel these people to pay a license and by so doing compel them to help pay our public expenditures, it will have a tendency to put a stop to such piratical business. As soon as our legislative committee has succeeded in having a law along these lines drafted, we are to submit same to the secretary of the Pacific Federation of Hardware and Implement Associations, who in turn will present it at the annual meeting of the Pacific Federation to be held in Spokane on January 22d and 23d next."

This shows very plainly that the Idaho law after being submitted to and discussed by the various dealers' associations referred to, was enacted into law in Washington by their concerted efforts.

The Hardware Trade of August 8, 1911 (page 26) publishes an account of the special meeting of the Idaho Retail Implement and Hardware Dealers' Association, held at Boise, June 29, 1911. One of its members had been trailing buggies, and the association compelled the member to take off his trailers and discontinue doing business by that method as it was injuring the business of some of the other mem-

bers of the association. The details of the so-called amicable settlement and even of the conversation which took place are reported in this particular paper.

## New Mexico.

Sec. 4141 of the Compiled Laws of New Mexico (1897) levies an annual license tax on peddlers on foot or with one animal $250.00; peddlers with two animals or more $300.00. By an amendment passed by the Legislature in 1901 (1901 Laws of New Mexico, p. 1042) peddlers were defined to include all persons who engaged in any itinerant trade by sample or otherwise, selling at retail to individual purchasers who were not dealers in the articles sold. This statute was further amended in 1903 (1903 Laws of New Mexico, p. 27) by excepting from its operation those who sold maps, books, newspapers, fuel, fruits and domestic machinery. With the laws of New Mexico in this condition, the case of *Territory vs. Russell* arose in 1904. See 86 Pac. 551, in which the Supreme Court of the Territory declared the above enactments valid and constitutional, the decision being rendered in June, 1906. The case of *Territory vs. Russell* was not appealed to the U. S. Supreme Court for the reason that at the time it was decided it had become a moot case because the statute under consideration had been repealed and replaced by another.

In 1905, the Legislature of New Mexico had enacted a new statute (1905 Laws of New Mex. p. 288) requiring peddlers and also solicitors taking orders for future delivery, to pay a license tax of $100.00 per year. Besides this amount, each peddler must deposit with the County Treasurer an additional sum of $1,000.00 in cash. Exemptions from this statute include agents selling goods to dealers, and all who sell books, papers, school supplies, fuel or household

machinery. This statute remains in force unchanged at the present time.

## Kansas-Oklahoma.

In 1901, the Kansas Legislature passed a peddlers' license law (c. 271 Laws 1901) which after imposing a license fee on peddlers exempted the owner of goods peddling them in the county in which he is a resident tax-payer or in the county immediately adjoining. This statute was held unconstitutional and invalid in the case of *In re Jarvis*, 71 Pac. 576.

Further change or amendment was made by the 1909 Legislature (Laws of Kansas, 1909, p. 535) by which an exemption is made in favor of all ex-union soldiers and sailors and all ex-soldiers of the 18th and 19th Kansas Cavalry.

The dealers of Kansas have been making a persistent and united effort to have a statute enacted which will protect them from outside competition. The following newspaper item appeared in the Farm Implement News, dated October 7, 1909, p. 26, regarding the preparations which were being made by the officers of the Southwestern Kansas and Oklahoma Implement and Hardware Dealers' Association for their coming meeting to be held in Wichita three or four weeks later.

*"Will Draft Peddlers' License Law.*

> At a meeting of the board of directors of the Southwestern Kansas and Oklahoma Implement and Hardware Dealers' Association an interesting program was outlined for the convention of the organization which will be held in Wichita, Dec. 7th, 8th and 9th.
>
> Among the subjects discussed was a peddlers' license law, a bill for which the directors

hope to have in legal form by the time the convention meets. The board expects to couch this bill in such terms that it will stand the test of the courts and at the same time protect the regularly established dealers from the peddlers and trailers of stoves and vehicles.

Thus far no peddlers' license law that has been enacted in Kansas has been found constitutional by the Supreme Court. The board has taken its cue from a law in another state which makes distinction between persons who are regularly established in business and those who come in from other states. It believes it has the key to the situation. Although the legislature will not meet until the winter of 1910 the association is beginning thus early to cover the matter thoroughly and avoid mistake."

The following is from the published report of Ford L. Wright, secretary of the Southwestern Kansas and Oklahoma Implement and Hardware Dealers' Association at their convention which met in Wichita, December 7, 1909: (Farm Implement News, Dec. 16, 1909, p. 30.)

*"Peddlers' License Law.*

The next thing to which I wish to invite your attention is a peddlers' license law. Oregon and Washington have succeeded in getting a law passed by their respective legislatures which has been on trial in the courts of Washington and decided by the Supreme Court of that state as being constitutional, in spite of the fact that different amounts of license were exacted from different classes of dealers and certain peddlers were not required to take any license. * * * * I took the matter of a peddlers' license law up last winter with one of our state senators and he advised that we get the bill we want enacted into law, in written form, submit it to some good attorneys for their

judgment as to its constitutionality and then have it introduced in the state legislature and appear before the proper committee and explain to them why we want such a law passed and show them the reasonableness of the bill and we would have no trouble in securing its enactment. He advised against our attempting to do anything at the last session of our legislature on account of these preliminary steps not having been taken, but now since we have plenty of time, let us get busy and not wait until it is too late to get an effective peddlers' license law passed at the next session of the Kansas and Oklahoma Legislatures.

I have written for a copy of the Washington Session Laws containing this particular bill and will furnish the legislative committee with a copy of this law as soon as I receive it. I wish to emphasize this part of my report as being the most important and trust that it will be given prompt attention, so that everything will be ready when the proper time comes."

As to the theory of such legislation and the alleged purpose of it, the following quotation is taken from a published report of an address by a Kansas dealer at the same convention. Farm Implement News, Dec. 16, 1909, p. 29.)

"One word about the implement dealer and how he has dealt with the catalog houses. Those houses have been to the top of the hill and are now sliding to oblivion where they belong. Manufacturers cannot justly do business direct with the consumer. If the middleman were done away with the farmer would be directly under the thumb of the factory. The dealer stands squarely between the farmer and exorbitant implement prices."

The Western Retail Implement and Vehicle Dealers' Association met at Kansas City, Missouri, on January 11, 12

and 13, 1910. We quote from the published report of the secretary of this Association, H. J. Hodge, on this occasion: (Farm Implement News, Jan. 20, 1910, p. 21.)

*"Peddlers' License Law.*

Your committee on legislation will make a full report in regard to the status of the peddlers' license law. The efforts of this committee, supplemented by those of the board of didectors and many members to secure the enactment of a law by the Kansas legislature last winter, were not successful for reasons which the report will explain; but recent developments in other states make it practically certain that the bill which was framed by the committee's attorney, who had but a short time prior been engaged in litigation to test the validity of the peddlers' license law in another state, was along the right lines, and if enacted would probably have stood the test of the courts, as it eliminated the element of discrimination, a point which had been fatal to the laws enacted by several states. I trust this convention will provide for continuing the fight in the legislatures of the several states under the jurisdiction of this association when again assembled. The expense incurred has not been heavy, and thus far has been paid out of the general fund, no assessments having been levied upon our members. Contrast this with the fact that the members of some of the sister associations on the Pacific slope have paid assessments of from $10 to $15 to defray the expense of prosecuting a test case to decide the validity of their law, and it having been declared constitutional by the state Supreme Court, it has now gone to the Supreme Court of the United States for final test. That association has made an appeal to the other associations of dealers east of the Rocky Mountains to lend financial aid in looking after the dealers' interests, and the officers of this and other dealers' associations will be asked to take some action in the premises."

At the close of this convention, resolutions were presented by the Resolutions Committee and adopted, from which resolutions we quote as follows: (Farm Implement News, Jan. 20, 1910, p. 28a.)

> "Realizing the great importance of the work undertaken by the legislative committee in its effort to secure the passage of a suitable and effective peddlers' license law, approving and commending the bill introduced in the last legislature of Kansas and deeply regretting its failure to become a law, therefore, be it
>
> Resolved, that the membership of this association, one and all, pledge their renewed support to this important measure and will diligently work and urge by use of all fair means the passage of this bill or similar measure at the next meeting of the legislature."

The Legislative Committee of the above Association was not ready to report at the time of the meeting. Their report was subsequently prepared and printed in the trade papers. We quote from it as it appeared in the Farm Implement News dated February 3, 1910, at p. 30. The report of this Legislative Committee goes into great detail and discusses the Washington and Missouri cases quite fully, and is especially full as to the efforts of the dealers to have a peddlers' law enacted in Kansas. The published report is as follows:

*"Peddlers' License Law—Report of Legislative Committee.*

> The report of the legislative committee of the Western Association was not read at the Kansas City convention on account of lack of time and inadvertently was omitted from the report of the meeting. The report is interesting because it deals mainly with the subject of peddlers' license laws, and is as follows:

We, your committee on legislation, beg leave to submit the following report:

At our last annual meeting resolutions were adopted declaring against the 'peddler and trailer nuisance' and instructing the legislative committee, under direction of the official board, to take such action as was necessary for the drafting of a peddlers' license bill that would be effective and that would stand the test of the courts, and use all means possible to have same enacted into a law.

The Kansas law now on the statute books was enacted in 1910, but later was declared unconstitutional by the state Supreme Court on account of "discrimination against non-resident peddlers." It was also found that similar conditions existed in most of the states where peddlers' license laws were enacted. With few exceptions the Supreme Courts have held the laws unconstitutional, where tested, on account of discrimination, conflict with interstate commerce law, or federal law concerning patents. This is true in Nebraska, Pennsylvania, North Carolina, Arkansas, Oregon and Utah; Missouri and Washington seem to be exceptions, although their laws are quite dissimilar, their Supreme Courts, in certain cases brought before them, having upheld the constitutionality of their license laws.

The Missouri law, which has been sustained by the United States Supreme Court and been in force for some sixteen years or more, makes no discrimination as to foreign or domestic peddlers; it has been tested several times and sustained in each case. Attorney Moore, employed by the Federation, cites the case of *Emert vs. State of Missouri*, a canvasser or peddler of sewing machines. This case went through to the Supreme Court of the United States in 1894. In its opinion rendered the court of the United States says: "The defendant's occupation was offering for sale, and selling sewing machines, by going from place to

place in the State of Missouri in a wagon, without a license. There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time. His dealings were not accompanied, nor followed, by any transfer of goods, or any order for their transfer, from one state to another, and were neither interstate commerce in themselves, nor were they in any way directly connected with such commerce. The only business or commerce in which he was engaged was internal, or domestic, and, so far as it appears, the only goods in which he was dealing had become part of the mass of property within the state. Both the occupation and the goods, therefore, were subject to the taxing power, and to the police power of the state." And further in this case the court holds: that so long as the peddlers' license tax did not discriminate in any way, but is uniform, it is a valid exercise of the police power of the state.

Quoting further from the opinion to distinguish between interstate commerce and the peddler: "The peddler, within the meaning of that word, as fixed by the common law, is a person who sells the very goods he carries with him in his pack or cart when traveling from place to place."

To distinguish between peddling and interstate commerce, Attorney Moore further states that "When a person goes from house to house taking orders for any commodity which is not in his possession, or in the state at the time the orders are taken, but which are sent to him from a foreign state, after the orders have been received and accepted and forwarded to such foreign state, the goods are protected by the commerce clause of the federal constitution. This is interstate commerce."

"As above stated the license law of Missouri does not discriminate in any way, but applies to the peddler generally and had been sustained in the state and United States Supreme Courts."

"On the other hand, the license law of the state of Washington, although making discrimination as to peddlers by difference of license being exacted from different class of peddlers and some peddlers not being required to take any license at all, has been in force for about five years and has so far been sustained by the Supreme Court of that state. But it now seems that the recent case of *McKnight against Hodge*, a peddler of toilet articles, has been appealed to the Supreme Court of the United States, and in view of the former decisions of the United States Supreme Court, *it is gravely apprehended that the Washington license law will share the same fate as other states whose laws have shown discrimination.*"

"The State of Missouri, therefore, seems to be the only one whose license law has so far been sustained by the Supreme Court of the United States."

Considering all these matters, and using the Missouri law as far as practicable as a guide, your committee and official board in January, 1909, determined to as far as possible leave no stone unturned in the drafting of the bill which should if possible be constitutional and effective.

The Kansas legislature being then in session, quick action became necessary. Realizing the necessity and importance of having the best of legal advice, the services of Judge A. B. Quinton of Topeka, one of the ablest constitutional lawyers in the state, were secured. Judge Quinton's many years of experience along legislative lines fitted him particularly for this work, and after carefully going over the data and weighing the various matters at issue, a bill was drafted, a copy of which is herewith attached.

The bill was short and concise, following the Missouri law and also follows the present Kansas law, except that the amount of the

license is greatly increased, being $50 per month for horse and wagon, formerly $50 for six months, and there is no discrimination between foreign and domestic peddlers; and the important clause which reads, "subsequent approval after orders are taken," and "before delivery of goods," does not conflict with the interstate commerce law.

*It is thought this will make quite a barrier or inconvenience to the foreign peddler.* It seems quite difficult to steer clear of certain constitutional laws and provisions, and still have something left that is of vital benefit to the retail dealer.

However, some of the best legal lights seem to think that this measure, though not altogether covering all that the retail dealer may desire, yet will act as a wholesome check to the whole peddler and trailer nuisance, and thereby become a great benefit and protection to the home merchant who pays taxes and all the legitimate expenses of doing business, and who is a citizen, builds up the community in which he lives and sells good goods.

And accepting this view of the case, your committee and those interested worked faithfully to have this measure enacted into a law. The bill was introduced into the Kansas legislature by Representative John M. Gray of Kirwin, Kan., who is a member of our association, and was attended and looked after by Senator Oscar Fagerberg, of Olsburg, Kan., also a member of our association.

Judge Quinton, who drafted the bill and who is a registered lobbyist, rendered valuable service, with the members, in getting the bill advanced at various times. It became evident that the measure was not popular with some of the members and was destined to have a hard fight, but mostly from those who were not posted as to the merits of this legislation. The judiciary committee of the house, to whom this bill was referred, reported unfavorably, but

through the efforts of Mr. Gray the bill was reinstated.

*Secretary Hodge and the chairman of the committee were both on the ground lobbying and doing what could be done to help the measure along.* The five members of the committee who were in the legislature all did valiant service for it.

The bill finally passed the house by a small majority, with some amendments, slightly reducing the fee, but the bill met a determined fight in the senate, headed by Senator Lower of Washington County. It was during the closing hours of the session and on the last night, when the measure came up for final action; Senator Lower threatened to blockade all legislation and thereby succeeded in securing enough votes to kill the bill, the vote standing 19 to 11, when up to that time enough votes had been promised to put the bill through.

It is the belief of those interested that if this bill could have been placed on the calendar earlier in the session it would have gone through and become a law, as its enemies could not have had the advantage which the rules under the final rush gave them, to defeat it.

In commenting on the failure of the passage of this bill, Senator Fagerberg suggests that *in order to secure the enactment of this and other much needed mercantile legislation,* it will be necessary for not only the implement, hardware and vehicle dealers, but merchants in general to take more active interest in politics; that of the seventeen hundred bills that were introduced, practically all that passed were recommended by some special committee, of which there were some thirty-seven in the senate and over forty in the house, but no committee on commerce or other suitable committee to handle this bill or other bills of mercantile interests. *This should be remedied* in the next legislature, *if we wish to accomplish much in commercial legislation.*

Up to the last minute it was expected that this bill would become a law. If it is a good thing, and we believe it is, this measure should be pushed along more vigorously than ever, and the forces lined up for the next legislature. In order to insure its passage, each member of this association should make it his personal business to present this matter to his elect representative and senator before the meeting of the next legislature, this being undoubtedly the surest way to accomplish prompt and favorable action.

We herewith submit the following resolution:

Realizing the great importance of the work undertaken by the legislative committee in its effort to secure the passage of a suitable and effective peddlers' license law, approving and commending the bill introduced in the last legislature of Kansas, and deeply regretting its failure to become a law, therefore be it

Resolved, That the members of this association, one and all, pledge their renewed support to this important measure, and will diligently work and urge, by use of all fair means, the passage of this bill, or a similar measure, at the next meeting of the legislature. (The italics our ours.)

Respectfully submitted,
Committee on Legislation,
C. F. Miller, Chairman."

On October 20, 21 and 22, the National Federation of Retail Implement and Vehicle Dealers' Association held their meeting in Chicago. Regarding their interest in peddlers' license litigation in the various states, we quote from the published proceedings of the Association a portion of the report of the secretary of the Association, H. J. Hodge, as follows: (Farm Implement News, Oct. 21, 1909, p. 15.)

*"Peddlers' License Law.*

While the full attainment of success in securing a valid peddlers' license law seems remote, yet some decisions have been rendered which make plainer the course necessary to pursue. *The fact has been well established that any law which contains the element of discrimination is unconstitutional, and dealers are wasting time in putting forth efforts to secure a law which discriminates between the resident and non-resident peddler, and peddlers of certains articles and not against peddlers in general.* No court has ever rendered a decision that would indicate that a law could not be so framed as to be constitutional, but it must not by its provisions restrict trade in certain lines. The Missouri law has been declared constitutional. A bill was framed by the attorneys for the Western Association last winter and introduced in the Kansas legislature, which it was believed by all of the Attorneys and judiciary committee of both houses would stand the test, but it was defeated in the rush incident to the closing hours of the session. It was similar in its provisions to the Missouri law. I think that this is too important a matter to drop and believe that all of the associations should continue their efforts to secure the enactment of a good peddlers' license law. I am just in receipt of the information that the Colorado law very recently has been declared unconstitutional. Every association should have a committee to take this matter in hand. It will be found that the manufacturers and jobbers at the trade centers will lend their aid, financially and otherwise." (The italics are ours.)

The Western Retail Implement and Vehicle Dealers' Association met at Kansas City, Missouri on January 17, 1911. The full report of this convention appears in Farm Implement News dated January 26, 1911. We quote from the report of Secretary H. J. Hodge on that occasion:

"During the past year Kansas and Oklahoma dealers have been greatly annoyed by peddlers. I have received letters, telegrams and telephone messages from members asking what recourse they had, and I was compelled to answer that they had none. However, arrangements have been made to introduce bills in the legislatures of both states that it is believed will stand the test of the courts, and in the event that your legislative committee calls upon you for assistance I trust you will respond promptly. I have information to the effect that in one locality within the jurisdiction of this association over $10,000 worth of goods were sold by peddlers during last fall. Your legislative committee will give you full information concerning the provisions of the proposed bill in its report to this convention."

At the same convention, the Legislative Committee made a report from which we quote as follows:

"We, your committee on legislation, beg leave to submit the following report:

The report of this committee this year must be necessarily, in the main, similar to the report of last year, as the legislative bodies have not met since 1909.

The history of the proposed enactment of a peddlers' license law is familiar to the most of you implement dealers, and we need not go into great details. You all realize the necessity of legislation for the protection of legitimate dealers, as against pirates of trade-peddlers and trailers. "To the retail dealer belongs the retail trade."

The peddler nuisance seems to be a very hard matter to handle and regulate. Practically all the states have peddlers' license laws, but when put to the test of the higher courts, they have been declared unconstitutional, on account of conflict with the interstate commerce

law. The Kansas law, like others, was declared unconstitutional on account of "showing discrimination against non-resident peddlers."

* * *

Now it should be the duty of every one of our members, as well as business men of all trades, to write their representatives and senators concerning the importance of this measure and urge them to vote and work for it. The bill is known as House Bill No. 6 and Senate Bill No. 31.

Our sister states are having as much trouble as we are. Oklahoma will introduce a similar bill in the legislature. *Missouri and some of the other states have had their laws sustained by their state Supreme Courts in certain cases brought before them, but it is believed by those well informed that they would not stand in the United States Supreme Court, being similar to those that have been declared unconstitutional.*

Learning by the mistakes of others, it has been conceded by those competent that the present bill has been so drawn that it will not conflict with the interstate commerce law.

Great things are accomplished only by united action, and if each member of this association will do his duty and immediately write his legislators, it is believed this legislation can be accomplished.

Mr. Miller continuing said: What is wanted are numerous petitions to be sent in immediately by various associations, also that each one of the members of this association write a personal letter immediately, even before he goes home from this association, or as soon as he gets home, to the representatives and senator with whom he is acquainted.

Now this legislation will be repeated in other states. We ask especially that the Kansas members of this association will sign these petitions which will now be circulated. We also will give to each Kansas delegate a petition to take home to have signed by the business men

of his neighborhood and to be forwarded to the representatives and senators.

Mr. Miller produced a copy of the proposed law and read it, and the association decided to send representatives to Topeka to give the bill personal attention." (The italics are ours.)

At the same convention, the Committee on Resolutions submitted a report which was duly adopted, from which we quote as follows:

*"Peddlers' License.*

Realizing the necessity for protection of the retail dealer from peddlers and trailers, be it

Resolved, That the members of the W. R. I. & V. D. A., here assembled, do hereby commend and urge the passage of the peddlers' license bill now introduced in the Kansas legislature, and pledge their earnest support of this measure by writing and interviewing their representatives and senators in behalf of same, and enlisting the co-operation of dealers in all lines of trade."

The following appears in Farm Implement News of March 23, 1911, page 24:

*"Kansas Peddler Bill Defeated.*

*Dealers Will Try Again.*

Defeated, but not discouraged, is the condition of the dealers of the Western Retail Implement and Vehicle Dealers' Association whose efforts to secure a peddlers' license law in Kansas were not successful. The bill backed by the association was accepted and passed by the Senate and for awhile it appeared sure to

win in the House. But before a vote could be obtained the members of the lower branch became engaged in a bitter fight over certain other bills. The result was that several measures which were slated for passage were sacrificed, the peddlers' license bill being one of them.

The bill is believed to have had enough supporters in the House to have insured its passage had it come to a vote under normal conditions, and this fact is encouraging to the dealers. Hence, the Western association will bide its time and when the legislature meets again a bill of the same character will be presented and pushed. The association believes it has a bill which will stand the legal test. For the information of other associations whose members feel the need of legislation governing peddling a copy of the measure is presented." (A copy of the law is then set out.)

The Legislature of Oklahoma in 1911, passed a law (1911 Sessions Laws of Oklahoma, Chap. 101, p. 217) giving the privilege of peddling, among other privileges, to disabled soldiers or sailors, or their widows, without the payment of any state, county, city, or town license or tax for so doing.

### South Dakota.

The Legislature of South Dakota passed a peddlers' license law in 1903 (Laws 1903, p. 25) imposing a graduated license tax to be paid to the County Auditor of from $20.00 to $75.00, and in addition thereto, such amount as is levied in city, town or village not exceeding $50.00 per day. The statute covers peddlers and also transient merchants, traders or dealers. It exempts those who sell nursery stock, agricultural products, milk, butter, eggs and cheese, and does not apply to agents doing business with retail merchants, manufacturers or jobbers.

The South Dakota Legislature in 1907 amended this law by increasing the license fee to more than double the amount prescribed for each class in the 1903 law, but it reduced the sum which could be charged by cities or towns to an amount not exceeding $25.00 per day. The statute of 1903 has been sustained in the case of *In re Watson*, 17 S. D. 486, 97 N. W. 463, and the subsequent amendments have been sustained in the case of *State v. Thompson*, 125 N. W. 567.

The dealers of South Dakota congratulate themselves that they have a statute which effectively shuts out all their competition and prevents outsiders from selling goods in the state. The published report of the South Dakota Retail Hardware Association held at Huron, March 2, 1909, in an address by O. L. Schutz, contains the following: (The Hardware Trade, March 9, 1909, p. 43):

> "You have a good peddlers' law in this state and this prevents the outside pirate from coming in and taking a share of your trade, but after you have sold your goods, what have you that insures protection against the deadbeats, etc. * * * Do you think it would be well and wise for your legislative committee to start the ball rolling toward the betterment of conditions? * * *"

And interesting sidelight on the manner in which these laws are enforced appears in the following news item taken from Farm Implements dated September 30, 1909:

> *"Wagon Peddler Fined.*
>
> From the Spearfish (S. Dak.) Enterprise. H. M. Cooper, an itinerant vendor of farm machinery, was fined $50 and costs Saturday for selling wagons in this county without a license. The suit was brought on complaint of John Wolzmuth, implement dealer of this city,

> State Attorney Heffron conducted the prosecution and the defendant's interests were looked after by Attorney Simonds of Bell Fouche, etc. * * *"

This is the invariable history of all such cases. The complaint against peddlers is invariably signed by a local dealer or store-keeper. Buggy peddlers are always complained against by the vehicle dealers. Such cases have never been known to be commenced on the complaint of a customer or purchaser. It some times happens that pressure is brought to bear by the local dealers on the prosecuting attorney so that he himself signs the complaint. There is no deviation from the general rule that all complaints or informations against peddlers are either made directly by local dealers or their association or by some officer whom they induce, oftentimes against his own will, to commence proceedings.

### Minnesota.

In 1897, the Legislature of Minnesota passed a statute (Laws of 1897 c. 107) imposing a license tax on peddlers, but the statute exempted among others, sales to retail dealers and also sales by any manufacturer, mechanic, nursery man, farmer, butcher, fish or milk dealer of the products of his factory or farm, either by himself or employe. This statute was held unconstitutional and invalid as being plainly class legislation. See *State vs. Wagener*, 72 N. W. 67. Questions relating to similar enactments passed by certain cities in Minnesota were before the court in the case of *City of St. Paul vs. Briggs*, 88 N. W. 984, and *State vs. Jensen*, 100 N. W. 644. That the retail dealers of Minnesota were instrumental in securing this legislation, we quote from an editorial in the Hardware Trade of January 12, 1909:

> "For ten years, the merchants of Minnesota have appeared at every session of the Legislature in the effort to secure the passage of a bill which would require the payment by traveling peddlers of a just license which would in a measure lessen the unfair advantage which these itinerant vendors now possess over legitimate merchants."

After detailing the steps regarding a particular bill which was passed and vetoed by Gov. Johnson, it continues:

> "It is understood that Gov. Johnson's reason for vetoing the bill was that he thought the license provided for was excessive. The bill called for the payment of a license fee of $20 in each county in which the licensee wished to do business, and inasmuch as there are some eighty-five counties in the state, it would call for the payment of a license fee of some $1,700 by a peddler who wished to cover the entire state."

After all this pressure by various associations, the Legislature of Minnesota in 1909 passed a new law relating to this subject (Laws of 1909, c. 248, p. 293) covering hawkers and peddlers and transient merchants, requiring the former to pay from $10.00 to $50.00 license fee, and the latter $150.00. The act did not apply to agents of wholesale merchants selling to retail merchants nor to the soliciting of orders by permanent merchants or other employes in the same or adjoining counties, nor to the sale of any article grown or produced by the seller and was not to operate in cities of over 50,000. This statute was declared unconstitutional as being unreasonable and arbitrary class legislation in *State v. Parr*, 123 N. W. 408. See also *State v. Ramage*, 123 N. W. 823, in which a city ordinance was held unconstitutional because of its exemption of the vendors of farm produce or of green fruits and vegetables. This left

the merchants of Minnesota without any artificial protection against their competitors, and they immediately got busy to secure some legislation giving them this protection. They organized the Minnesota Commercial Federation from among the members of the various lines of business desiring protection. The constitution of this Federation is printed in its entirety in The Hardware Trade of September 21, 1909. We quote a part of this constitution as follows:

> "Art. 11, Sec. 1. The objects for which this Association has been established are for the purpose of united effort and definite action on the part of the various retail commercial associations of Minnesota, and for the general betterment of conditions pertaining to retail merchandising and to carry out the purposes of the affiliated organizations by means of co-operation and to secure such legislation as will promote the business interests of the state."

The Minnesota Commercial Federation held a meeting in Minneapolis on May 19 and 20, 1910. From the report of this meeting, we quote from Farm Implements dated May 31, 1910, as follows:

> "Representatives were present from Retail Jewelers Association, Retail Furniture Dealers Association, Minnesota Druggists Association, Minnesota Retail Implement Dealers Association, Retail Hardware Dealers Association, Minnesota Retail Grocers Association, General Merchants Association, Minnesota Funeral Directors Association."

There was a long discussion about what legislation to propose for the benefit of the Federation and its members.

> "Finally the conference came to the conclusion that it would be best to attempt to enact

only the following proposed laws, and not to champion more than seven or eight bills, the principal ones being: Fraudulent Advertising Law; Peddlers' License Law; Garnishment Law."

Committees were appointed on each proposed law.

"Committee on Peddlers' license law reported that they favored the introduction of a bill similar to that passed at the last session, eliminating those things which proved to be unconstitutional."

We quote further from another report of the same meeting which appeared in The Hardware Trade dated May 31, 1910:

"A resolution was adopted favoring a repassage of the peddlers' license law with the unconstitutional provisions of the present law eliminated. * * * The Federation purposes to employ counsel to redraft the bill so that it will remedy what is declared to be one of the worst evils that affects retail merchandizing—the selling of goods by itinerant peddlers. It is the intention of the Federation to provide means of educating the merchants of the state as to the need for this legislation so that all may work among their local representatives in the state legislature to create a sentiment in favor of such measures. During the legislation, a paid lobbyist will be employed whose duty it will be to remain in St. Paul and keep an eagle eye on the doings of the legislature with regard to their effect on the merchants. * * * A legislative committee consisting of the chairman of the legislative committee of each organization affiliated with the organization and one other member from each organization with A. E. Barker of Minneapolis as chairman was appointed. This committee will work in be-

> half of the proposed legislation from now to September when another meeting of the Federation will be held to make further plans for carrying on the fight."

In the account of the convention of the Minnesota Retail Hardware Dealers' Association held at St. Paul, Feb. 14, 1911, published in the Hardware Dealers' Magazine for March, 1911, page 586e, is the following:

> "Secretary Mathew's report showed a membership at the present time of 1,068, a gain of 62 during the past year. A new peddlers' license bill has been introduced in the Minnesota legislature and as care has been taken to avoid the unconstitutional features of the 1909 measure, there is a good prospect for it to become a law."

Another periodical, the Hardware Trade, February 1, 1911 (page 23) gives a summary of Secretary's Mathew's report as follows:

> "A new peddlers' license bill has been introduced in the Minnesota legislature, and as care has been taken to avoid the unconstitutional features of the 1909 measure, there is a good prospect of securing the long needed relief."

The following news item appeared in the Hardware Trade, May 2, 1911, page 18:

> "At the session of the Minnesota legislature which was recently concluded there were two bills that passed and became laws, of considerable interest to the retail hardware dealers. Reference is made to the Peddlers' License Law and the Transient Merchants' Law. (Setting out their provisions.) It is suggested that

each hardware dealer communicate with his State Senator or Representative and obtain copies of these important bills, so that he will be in a position to see that they are properly enforced in his territory."

The following news item appeared in The Hardware Trade, October 3, 1911, page 42:

*"Peddlers to Be Prosecuted.*

It is reported that J. J. Ryan, secretary of the Minnesota Retail Grocers' and General Merchants Association, has been instructed to employ an attorney to prosecute the peddlers who were selling stoves in Zumbrota. The report also states that Senator A. J. Rockne of Zumbrota, will assist the county attorney of Goodhue County, when the law is tested in the District Court.

The officers of the state association believe that if the peddlers' and transient merchants' license laws are properly enforced, that no non-resident merchant can do business in a community without paying a license, and if local merchants neglect to see that these laws are enforced it is their fault."

From the president's address before the Minnesota Retail Implement Dealers' Association, at Minneapolis, January 10th, 1912. (Farm Implement News, January 18, 1912, page 19.)

"Federation of Retail Merchants.—The Commercial Federation of all retail merchants was organized nationally at Chicago the same week of the Implement Federation meeting, and this is a step in the right direction. This Federation has been of much benefit in Minnesota for some years, and the advantage of all retailers being banded together for protec-

tion and mutual benefits is apparent. Legislation regarding deadbeats, peddlers, box car merchants, etc., can be secured by the combined efforts of these associations federated together."

At the same meeting, the president introduced J. J. Ryan of St. Paul, Secretary of the Commercial Federation of Retail Merchants' Association of Minnesota. Mr. Ryan said:

"One of the objects of the Federation is to interest business men in politics. The average business man has too little interest in political affairs and is satisfied to let the demagogues and professional politicians and lawyers fill the legislative halls. But we had twenty-four business men in the lower house of the Minnesota legislature last session and a corresponding number in the senate, and these men were the bulwark and backbone of the body. The laws passed, like the peddlers' license law, covering transient merchants, were the result of the work of these business men. It was fathered by Senator A. T. Stebbins, of Rochester, one of the the oldest and ablest implement and hardware dealers in the state."

In a trade paper called Farm Implements, published January 31, 1912, page 26) the following is given in the report of the president's address before the Minnesota Retail Implement Dealers' Association.

"The Commercial Federation of all retail merchants was organized nationally at Chicago the same week of the National Federation meeting, and this is a step in the right direction. This Federation has been of much benefit in Minnesota for some years, and the advantage of all retailers being banded together for protection and mutual benefit is apparent. Legislation regarding deadbeats, peddlers, box car merchants, etc., can be secured by the combined efforts of the associations federated together."

In the Hardware Trade of February 6, 1912 (page 28) is given a summary of the accomplishments of the National and State Hardware Associations, and what they have done for their members. The following is quoted:

> "As far as state legislation is concerned the associations of hardware merchants have been actively to the front and have both promoted and defeated various laws as they came up. For example, State Senator Stebbins, former president of the Minnesota hardware association, introduced and pushed to passage peddlers' license and transient merchants' laws that have proved of value in dollars and cents to every retailer in the state. In this work he was enthusiastically supported not only by the association as a body, but by the individual members as well."

## North Dakota.

The Legislature of North Dakota in 1903 enacted a statute (1903 Laws of N. D. c. 165, also referred to as 1905 Codes of N. D. Sec. 2204 and 2211) levying a graduated license tax upon peddlers ranging from $5.00 to $75.00 per year.

In 1907, the Legislature passed an enactment relating to transient merchants (1907 Laws of N. D. p. 409) imposing a state license tax of $75.00 on each transient merchant, and in addition thereto, a sum not to exceed $25.00 per day as may be required by city ordinance where the business is conducted. If the merchant claims to be a permanent merchant, he is required to give a bond in the sum of $500.00 to the city or village, which shall become enforceable provided he fails to become a permanent merchant.

In 1909, the Legislature of North Dakota attempted to amend Sec. 2206 of the Revised Code 1905, by enlarging its terms to include transient merchants, traders or dealers and

increasing the size of the license fee. This statute was vetoed by Governor John Burk on the ground that it was unconstitutional. His veto is given in full in the 1909 Laws of N. D. p. 351.

That the dealers of North Dakota and their association have urged and secured this legislation and that they wish it for the purpose of destroying their competition is plainly shown from the published proceedings of the North Dakota and Northwest Minnesota Retail Implement Dealers Association held at Fargo, February 2, 1909. We quote from an address or report delivered by Paul D. Allen of Jamestown, North Dakota, who is vice-president of the Association and who was a delegate to the National Federation. His report is as follows: (Farm Implements, Feb. 27, 1909, p. 40.)

*"Peddlers' License Law.*

A great deal of discussion came up on the subject of a peddlers' license law. Secretary Hodge read an opinion obtained from C. E. More, attorney for the National Association of Agricultural Implement and Vehicle Manufacturers, covering Supreme Court decisions of this subject and it seemed that the popular belief that peddlers had everything in their favor was incorrect. The South Dakota delegates stated that they had a very satisfactory peddlers' license law in their state, and which had been tested in the courts. In North Dakota we have probably not realized the necessity for legislation on this subject to the same extent that they do in the older states further east. The competition from peddlers and buggy trailers is regarded as a growing evil in many sections, and we will no doubt soon feel it in our own territory to a considerable extent, if steps are not taken to discourage it. In the vehicle line, especially, this competition is making

> trouble in some states for legitimate dealers who carry stocks of vehicles on which they have to pay taxes, insurance and rents for warehouses, while the buggy trailers escape all these expenses, and in justice, not only to the vehicle dealers, but to the taxpayers as well, should be compelled to pay a good big license which would offset the fixed expenses of regular dealers and assist in the support of the communities in which they do business. I would suggest that our legislative committee correspond with the secretary of South Dakota Association, and get information relating to their license law."

Further regarding the active interest of the dealers in these states and their purpose in procuring peddlers' license laws, we quote from the published proceedings of the North Dakota Retail Hardware Association which met at Grand Forks, North Dakota, January 25, 1910: (The Hardware Trade, Feb. 8, 1910, p. 45.)

> "G. W. Wolbert, member of the State Legislature, said that the state has a peddlers' license law, but that the fee is so small and the law is so imperfectly enforced that it is almost inoperative. Mr. Wolbert said that the merchants of South Dakota are enforcing a law which is actually keeping the steel range peddlers of St. Louis, Missouri, out of the state on account of the high license they must pay. The North Dakota law, Mr. Wolbert said, provides for a $50 license in every county but as the sheriffs receive no compensation for enforcing the law, it is not enforced and oftentimes a peddler does business in two or three counties by paying for a license in only one of them."

The Legislature of North Dakota in 1911, passed a statute (1911 Laws of N. D. Chap 201, p. 306) relating to tran-

sient merchants who were defined as those who engaged in the vending or selling of merchandise at any place in the state temporarily and who did not intend to become and did not become a permanent merchant of such place. He was required to procure a license, paying the state $75.00 a year and in addition, such amount to the treasurer of any city or village where he conducted his business, not exceeding $25.00 per day as may be determined by city ordinance. If he claimed to be a permanent merchant, he could be compelled to put up a bond of $500.00 to secure the payment of the state and local license fees in the event he failed to become a permanent merchant. He was prohibited from advertising any sale such as a sale of bankrupt, insolvent, receivers, or assignees sale, or job lots, or closing out of damaged goods by smoke, fire, or water, or any other special or peculiar circumstances, advertising that such goods will be sold for less than their real value, without procuring the license and paying the fee prescribed. Any violations are subject to fine or imprisonment or both.

### Nevada.

The compiled laws of Nevada, Sec. 1195, imposes a license tax upon traveling merchants, peddlers, auctioneers, etc., of from $10.00 to $25.00 a month, but it exempts the sale of fruits or agricultural products of the State of Nevada or the State of Utah. By sections 1242 and 1246, a license tax is imposed upon itinerant or unsettled merchants or traders, who are defined to be those who have no manifest intention of settling permanently at some one place in the state, and who are not permanently located and regularly taxed therein. License fees are to be fixed by the Board of County Commissioners or the City Council where the business is conducted, and the license fee shall not be less than $5.00 per month nor more than $100.00 per month.

In 1905, the Nevada Legislature passed a statute (1905 Statutes of Nevada, p. 290) licensing itinerant and unsettled merchants, traders, peddlers and auctioneers, and imposed a license tax upon them which cannot be granted for more than one month and cost the applicant $300.00. The act does not apply to salesmen "for wholesale houses in this and other states so long as they do not attempt the sale of goods, wares and merchandise, at retail in competition with established retail dealers," and it does not apply to the sale of products of any farm, ranch or range situated within the State of Nevada.

In 1907, the Nevada Legislature passed a statute (1907 Statutes of Nevada, p. 374) providing that it should thereafter be unlawful to impose or collect any license or tax upon any salesman employed by or selling the goods of any manufacturer, compounder, wholesaler or jobber, whose factory or store is located in Nevada.

These statutes in Nevada, by common consent, are admitted by Attorney General and various prosecuting attorneys to be unconstitutional and invalid, and no effort is made to enforce them.

## MONTANA.

Montana Codes Sec. 4066, imposes a license tax upon every traveling merchant or peddler, varying from $12.50 to $30.00 per quarter, but it exempts agricultural products raised by the seller or articles manufactured by himself. The same statute was re-enacted in 1897 (1897 Laws of Montana, p. 201) and the license tax was increased to a maximum of $50.00 per quarter.

By a statute passed in 1901 by the Legislature of Montana (Laws of Montana, 1901, p. 62) all honorably discharged soldiers and sailors who were residents of Montana

are given the right to peddle and sell their own goods and to engage in auctioneering without any license whatever.

In 1903, the Legislature of Montana passed a statute (1903 Laws of Montana, p. 117) which is given in full as follows:

> "That every person, firm or corporation who peddles out, or after shipment to this state, canvasses and sells by sample to users and consumers, clocks, agricultural implements or machinery, stoves or ranges, wagons, buggies, carriages, surries or other similar vehicles, washing machines or churns, shall pay in advance a license tax of $500.00, and for each calendar year or portion thereof, to be paid in each county in which said occupation is pursued."

This statute has never been passed upon by the Supreme Court of Montana, but it has been held unconstitutional and void by numerous inferior judges throughout the state.

It will be noticed that the Washington law of 1905 was an exact copy of this Montana law. As before stated, the 1905 Washington law was declared unconstitutional in the case of *Bacon v. Locke*, 83 Pac. 721.

In 1905, the Montana Legislature again amended Sec. 4066 of the 1895 Codes of Montana (1905 Laws of Mont. p. 177) in which the original statute is practically re-enacted but with increased fees for license. It still exempts agricultural products raised by the seller or articles manufactured by him.

The Legislature of Montana in 1911, passed another statute (1911 Laws of Montana, Chap. 110, p. 197) relating to itinerant vendors. It provides "that every person, company or corporation who at temporary quarters, sells or offers or exhibits for sale, any goods, wares or merchandise, and every

person who travels about from place to place and transports by any mode of conveyance and sells, offers or exhibits for sale, any goods, wares or merchandise, and every person who personally solicits orders for the future delivery of any goods, wares or merchandise, either by or without sample, including peddlers and hawkers, is an itinerant vender within the meaning of this act." It exempts wholesale dealers selling to dealers or merchants, and any person or the representative of any person, company or corporation doing business at a fixed place of business and taking orders for future delivery of such goods kept at or in connection with or handled through such fixed place of business. It also exempts the sale of books, papers or school supplies, or the sale of any fruits, vegetables, meats, or other farm products when sold by the grower or producer.

The statute then defines the "person, company, or corporation doing business at a fixed place of business" as those who keep, offer or expose for sale to the general public in a building of permanent nature, goods of any description, but it does not include anyone keeping any goods or transacting any business in any rented apartment or any hotel, boarding house, lodging house, or private residence, or in any building not designed for or commonly used as a store or shop. License fees are required varying from $12.50 per quarter up to $100.00 per quarter. Violations are punishable by fine or imprisonment or both.

## California.

Sec. 3366, Pol. Code. (Statutes 1901 p. 635) empowers the Board of County Commissioners in each county to license, in the exercise of their police power, all kinds of business not prohibited by law. Under this statute, each county determines for itself, the amount of regulation which they

deem necessary and the amount of license fee for that purpose. As a sample of such county ordinances, the following from the County of San Louis Obispo may be mentioned. By that county ordinance, every traveling merchant who sells or solicits orders for the sale at retail of any buggies, carriages, hacks or road vehicles of any kind, or farm machinery of any kind, or stoves or ranges, or pianos or organs or musical instruments of any kind, must obtain a license and pay a fee therefor of $250.00 per quarter. If anyone conducted such business from his regularly maintained stock and established place of business within the county, he was required to pay only $20.00 per quarter. Every solicitor of periodicals, books or magazines not published within the county, was required to pay a license fee of $50.00 per quarter. This county ordinance was held unconstitutional in March, 1910, as being plainly unreasonable in its terms, discriminatory and confiscatory.

## Nebraska.

Sec. 4984 of the Compiled Statutes of Nebraska, 1905, (Comp. Stat. 1911 c. 77 Art. 1 Sec. 62) provides that peddlers who work outside of any city or town, shall pay an annual license tax of from $25.00 to $75.00. The statute does not apply to parties selling their own works or production, or books, charts, maps or other educational matter, either by themselves or employes, nor to persons selling at wholesale to merchants, nor to persons selling fresh meats, fruit, farm produce, trees or plants, exclusively.

This statute was construed in *Stratton vs. State*, 137 N. W. Rep. 903 (Neb.).

That the retail dealers of Nebraska are attempting to secure additional legislation to protect them, we quote from the published report of the Nebraska Retail Hardware Asso-

ciation held at Lincoln, February 8, 9, 10 and 11, 1910, which report appeared in the Hardware Trade issued February 22, 1910, at page 31:

> "The State of Nebraska having been seriously afflicted during the last four months by a number of range peddlers, a general discussion lasted part of the afternoon and the best methods of preventing any further peddling of this class of merchandise and the advisability of using the best endeavors of the association to enact a law at the next meeting of the State Legislature prohibiting such peddling, were thoroughly discussed. The discussion on range peddlers was precipitated by a paper prepared and read by Samuel Long of Superior in which he makes the interesting suggestion that every dealer put ranges on a wagon and go out and peddle them in active competition and try to prevent the non-residents from selling ranges. His paper concludes as follows:
>
> 'If I could sell a range off the wagon, I would try and sell all I could consistently, and cover the territory as soon as possible and get all the prospects and keep in touch with them, and those that would not likely buy at once, call on them again and again until I set a range in the house. I know I could keep the peddlers from selling ranges in our territory and am sure anyone else can do the same."

The suggestion that local dealers themselves engage in peddling whenever there are peddlers in their neighborhoods has often been made. This shows plainly that they have no objection to this plan or manner of sale provided they think it necessary to stimulate their business. A trade magazine called the Metal Worker, prints an article on this subject which is quoted in The Hardware Trade of October 4, 1910. The article urges all dealers to prepare printed circulars an-

nouncing their coming and to fit up a wagon with stoves and go out through the country and peddle and make sales wherever possible. The article concludes as follows:

> "In many instances, this would be exactly what the steel range peddler has been doing in different parts of the country to make inroads on the trade which should belong to the local store dealer."

The Mid-West Implement Dealers' Association met at Omaha, November 14th, 1911. The following is a quotation from the report of the secretary, M. L. Goosman. (Farm Implement News, November 23, 1911, p. 25.)

> "We feel that there should be a permanent legislative committee appointed, the duty of this committee being to endeavor to prevent the enactment of any laws which would have tendency to jeopardize our business interests, and to use their influence in getting other laws which would be beneficial. It should interview the candidates, if possible, or correspond with them and learn whether they were favorable or unfavorable to such legislation as we might be interested in and after getting his views on the matter at hand the members should be informed. Take it in the case of a state senator or representative, it would be necessary to write only those who lived in any particular candidate's district."

The Hardware Dealers' Magazine in March, 1911, page 586, gives a summary of the secretary's report of the same convention, from which the following is quoted:

> "As to legislative matters, working in conjunction with several other organizations, a competent attorney was employed and the fol-

lowing bills drafted: A peddlers' License, an amendment to the Exemption Laws, a bill to prohibit gift enterprises, otherwise known as the trading stamp evil, etc. It is hoped to at least accomplish the enactment of the Peddlers' License, which will prevent the horde of range peddlers that annually traverse certain sections of the State."

The following is a quotation from the printed report of the proceedings of the same convention as they appeared in the Hardware Trade of February 21, 1911, page 72:

*"Legislative Matters.*

Heretofore the various retail mercantile associations have endeavored to fight their battles alone, and frequently have run foul of each other and crossed each other's activities with the expenditure of a good deal of time and unnecessary expense. Mr. Fred Diers, president of the Federation of Nebraska Retail Merchants, conceived the idea that by united action of all the retail associations through one joint legislative committee, all these matters could be handled more expeditiously, and took upon himself the liberty to call a meeting of the executive committee of the several associations. Four of these associations were represented at a meeting held in Lincoln last September, and one more came into the organization afterwards. The new organization took for its name The Nebraska League of Retail Mercantile Associations.

Mr. Diers of the retail merchants and your secretary were appointed as the legislative committee to represent all these associations in such legislative matters as was expedient. With a proper fund subscribed by the various associations to pay all the expenses incident to these matters, a competent attorney was employed, and under our direction drafted the following

bills: A peddlers' license, amendment to the exemption law and a bill to prohibit gift enterprises, otherwise known as the trading stamp evil. Fortunately we have as members of the legislature, some of our own association members, and these bills were placed in their hands, and during the past week were reported back to the house of representatives, and placed on the general file. Unless some unforeseen incident happens we are in hopes of having at least a peddlers' license law that will help resist the inroads of the next siege of range peddlers that have so successfully carried away so much of the range business of the state during the past year and a half or more."

The following short summary of the same convention was published in the Hardware Dealers' Magazine of March, 1912, page 595:

"Secretary J. Frank Barr, Lincoln, in his annual report showed a membership of 724, a gain over the previous year. The Peddlers' License law that is on the statute books is not sufficient in its provisions to protect the Hardware trade. A new bill was introduced but fell by the wayside. The range peddlers are still actively at work."

## Arizona.

Sec. 2860 of the Revised Statutes of Arizona, 1901, levies a license tax upon every traveling merchant or peddler, amounting to from $75.00 to $100.00 per quarter in each County. The statute does not apply to the sale of farm products.

In 1903, the Legislature of Arizona passed a statute (1903 Sess. Laws of Ariz. p. 152) re-enacting the former statute, but increasing the license fee to a maximum of $400.00 per year.

In 1909, the Legislature of Arizona passed another statute on this subject (1909 Sess. Laws of Ariz. p. 175) in which the license fee is enormously increased, the other terms of the statute remaining about the same. By this statute, a license tax is levied of from $75.00 to $200.00 per quarter in each county. By this statute, the sale of farm products is exempted.

ILLINOIS.

The Illinois Retail Implement and Vehicle Dealers' Association held its meeting at Peoria, Illinois, December 7, 8 and 9, 1909. Their discussion covered the question of direct sales by manufacturer to consumer, and at the close of their convention, they adopted a set of resolutions from which the following is quoted: (Farm Implement News, Dec. 16, 1909, p. 23.)

> "6. Resolved, that this association is decidedly opposed to the manufacturers or jobbers selling any of the goods they make or sell to any but a regular dealer who buys and sells the goods for a reasonable profit no matter whether it be to a dealer or an association of men of whatsoever name. Simply to buy in car lots does not make a party a dealer."

On January 19 and 20, 1910, the Southern Illinois Retail Implement and Vehicle Dealers' Association met in East St. Louis, Illinois. They discussed the question of mail order competition and direct sales by manufacturers to consumers. Regarding this subject, we quote from the published report of the president's address as follows: (Farm Implement News, Jan. 27, 1910, p. 20.)

> "The catalog house question is not dead, and perhaps will not be during the lifetime of this association. Your officers have not made any special arrangements to have it covered at

this meeting, that is, we have not arranged for an address covering that specifically. However, as I have just said, this question is not a dead one. It is in existence today the same as it was a year ago, and competition is as strong as it was at that time. Every member of the association, however, can combat this in his own office or his own store in an intelligent way. He may do so by, whenever the opportunity arises, throwing as much cold water as possible upon his business. As far as legislation is concerned, it probably will never be that the catalog house will be put out by the legislature. Their business is lawful and as legal as ours. The courts cannot touch them, but as competitors of ours, it is our duty to combat in every way possible their plans and their business."

MISSOURI.

An old statute in Missouri (General Statutes of Mo. 1865, c. 96, Sec. 1) relating to peddlers, defined them to be those who sold articles which were not the growth, produce or manufacture of the State of Missouri. The statute also exempted certain enumerated articles. This statute was held valid by the Supreme Court of Missouri in the case of *State vs. Welton*, 55 Mo. 288, but on appeal to this court, the statute was held discriminatory and unconstitutional. *Welton vs. Missouri*, 91 U. S. 275. Subsequently, the statute was re-enacted leaving out the phrase "Which are not the growth, produce or manufacture of this state," but the new statute added a number of articles to the enumerated list of those exempted by it. (See 1899 Revised Statutes of Missouri, Sec. 8861 *et seq.*) This statute was before this court in the case of *Emert vs. Mo.*, 156 U. S. 296, in which it was held that in the case of an ordinary peddler selling and delivering on the spot, the statute was not void as a regulation of commerce, no other points of unconstitutionality being considered.

In 1911, the Legislature of Missouri passed a statute (1911 Laws of Missouri, p. 422) relating to itinerant vendors who were defined as those who engaged in or conducted in this state, either in one locality or traveling from place to place, a temporary or transient business of selling goods with the intention of continuing in any one place for not more than 120 days, and who for the purpose of carrying on such business, hired, leased or occupied any room or structure for the exhibition and sale of such goods. The statute did not apply to sales made to dealers by commercial travelers or selling agents in the usual course of business nor to *bona fide* sales by sample for future delivery, nor to hawkers on the streets or peddlers from vehicles, nor to sales made at the annual fair of an agricultural society. Each itinerant vendor is required to deposit with the Secretary of State $500.00 as a special deposit, and the further sum of $25.00 as a state license fee. Also any and all license fees provided by any county or municipal corporation for such sales. Violations are punishable by fine of not less than $200.00 nor more than $1000.00, or by imprisonment or by both.

## Iowa.

1897 Code of Iowa, Sec. 1347-48, provides a graduated county license on peddlers, varying from $10.00 to $75.00. The statute does not apply to parties selling their own work or production either by themselves or employes nor to persons who have served in the union army or navy, or to persons selling at wholesale to merchants. The County Board of Supervisors may remit the license tax where the articles sold are of an educational nature, or where the peddler is incapacitated for manual labor on account of age or infirmity. This statute was declared unconstitutional and invalid in the case of *State of Iowa vs. Garbroski*, 111 Ia. 296, on the

ground that it created an arbitrary classification which resulted in a discrimination between persons in substantially the same situation.

In 1898, the Iowa Legislature passed an amendment (Supp. Iowa Code 1902 Sec. 1347-a) changing the license fee to from $1.00 to $50.00 annually, or at that rate per quarter. All the exemptions of the earlier law were re-enacted.

In 1904, a new statute was enacted on this subject (1904 Laws of Iowa, p. 41) imposing a license tax of from $5.00 to $100 per year, and the word "peddler" was defined to include all transient merchants and itinerant vendors selling by sample or by taking orders for immediate or future delivery. The statute exempted persons selling at wholesale to merchants, also transient vendors of drugs and persons running a huckster wagon or selling fresh meats, fish or vegetables, and also persons selling their own work or production.

In 1907, the Iowa Legislature passed a statute (1907 Laws of Iowa, p. 68) re-enacting the former statute of 1904, but changing the license fee from a schedule of from $25.00 to $75.00 per year, and retaining all the exemptions of the former act.

The present statute has not been before the courts for adjudication, but under the principles announced by the Supreme Court in the case of *State vs. Garbroski*, it is evident that the present statute is also discriminatory and hence invalid.

Trade papers comment on the fact that this statute when enforced gives prettty good protection from competition to the Iowa dealers who interest themselves to enforce the law when their business is interfered with. The statute is often used as a more or less effective hold-up, even though the merchants know that it could not be enforced if resisted. We quote from The Hardware Trade under date of May 4, 1909, some comments relating to the Iowa law:

"* * * In Iowa, the state peddlers' law has been particularly beneficial to legitimate retail merchants. 'In counties where the merchants have insisted on its enforcement' writes Ira B. Thomas, secretary of the Iowa State Retail Merchants Association, in a letter to The Hardware Trade they have practically driven all the peddlers from that county, and while it is true that any state peddlers' license law cannot be enforced to conflict with the interstate commerce law, it is also true that there are very few peddlers doing business in the different states under a strict observance of the interstate commerce laws, and a majority of those peddlers, rather than go to the expense and take the time to defend a case, will either pay the license or fine, or leave the county, which in either case, will give the desired result. * * *"

## GENERAL.

Recently there has been inaugurated a new movement to unite all the retail storekeepers in the country in one organization. Of course, the trade papers comment upon this organization freely. See Farm Implement News, October 19, 1911, page 25.

On October 18th and 19th, 1911, delegates to the number of 233, coming from thirty-five states and from Canada and representing 212,000 retail merchants, met in Chicago and formed the National Federation of Retail Merchants. The purpose of this organization is to combat the dangers that are threatening the retail dealers at the hands of the elements in the business world which are inimical to the present plan of doing business through the retail merchant as a constituent factor in the business organism.

In Farm Implements, October 31, 1911, (page 20), the following appears:

> "The ultimate object of this movement is to unite a million retail merchants of this country by means of a federation. When any national or state legislation is being proposed inimical to the interests of the merchants, the influence of this powerful army could be immediately utilized."

In the same issue, (page 46), is a report of the annual convention of the National Federation of Retail Implement and Vehicle Dealers' Associations, held in Chicago, October 17th, 1911. The following is from the published report of the secretary:

> "Your attention is called to the fact that there is a movement on foot to organize a Federation of retail merchants in all lines. The purpose of this national federation as set forth in the call, is to effectively stop legislation inimical to retail merchants, and to promote legislation for the advancement of same. A meeting has been called for the 18th and 19th in this city, and our federation and its constituent associations have been invited to send representatives to said meeting."

The issue of Farm Implements of December 30th, 1911, (page 18) has an editorial entitled "Protective Legislation for the Retail Merchant" based upon a statement made by the secretary of the National Federation of Retail Merchants before a special committee of the Interstate Commerce Commission. It deals principally with the fact that government prosecutions had been commenced against certain dealers' associations on the ground that they were in restraint of trade. The full text of the secretary's statement appears in the same

issue. The object of the federation is there stated to be to serve and safeguard the interests of retail merchants, to oppose unjust legislation inimical to them and to promote all just legislation designed for their benefit.

Further as showing the work and purposes of this gigantic organization, see Farm Implements, October 21, 1912, (page 12) which is an editorial on this subject, from which the following is quoted:

> "A great deal of progress has been made, but the retail trade does not appear to be fully awake to the absolute necessity of united action to prevent legislation inimical to its interests, as well as the need of advocating measures which will give the retailers of the country rights and privileges to which they believe they are entitled. * * * Its efforts should also be directed toward the securing of legislation which would permit merchants in all lines of trade to exercise and enjoy privileges without which they cannot conduct their business legitimately and successfully. It should, and can, be constructive as well as objective, and every retail merchant in the country should be a member."

The foreging summary of the peddlers' license statutes of the various states is not intended to be complete or exhaustive. It covers the important enactments on this subject in those states west of the Mississippi River. The Legislatures of many of the eastern states have been subjected to the same pressure by dealers' associations, and many of them have enacted license laws of the same general sort as the western states. Enough has been given to show conclusively that there is an organized and concerted effort being made throughout the United States by individual dealers and through their associations and federations to enact laws on this

subject which are solely for the purpose of benefiting the trade of every constituent member. The quotations already given show beyond question the fact that the dealers' interest in this legislation, and their active interest in proposing and securing it, are all matters of common knowledge thoroughly understood and well known by all. Statutes, themselves, which have been enacted show on their face what their purpose is intended to be, and what their effect and operation is. Many of them by their express terms discriminate in favor of the local merchant by exempting from the statute the sale of those articles which do not enter into competition with local dealers; many other statutes limit their operation only to those who are not permanently engaged in business at a fixed place, thus plainly discriminating in favor of those so situated; many other statutes are confined only to those who sell at retail to individual consumers, thus plainly showing an intention to penalize only those who carry on business in competition with the local storekeeper; many other statutes by the enumerated articles which they cover or by the enumerated articles which they exempt, show plainly the kind and character of business which it is their purpose to protect, and finally each and every statute mentioned shows plainly on its face by the amount of the license fee exacted, that proper and necessary regulation is not its purpose, but that annihilation and entire suppression of the business is contemplated and expected by its enactment. The license fee in each and every case is put at such an exorbitant figure and the conditions surrounding the issuance of the license are so exacting and onerous, that no person could comply with the statute and pay the enormous fees demanded and continue in business. This is exactly the result intended to be reached by their passage. That such a purpose and such an effect so well understood and so clearly proved, if not admitted, constitute a perversion of the police power of the

state and render such enactments invalid, can scarcely admit of any doubt.

We cannot better close this brief than by quoting a remark of the late Chief Justice Fuller from 156 U. S. 1, at p. 13:

> "Acknowledged evils, however grave and urgent they may appear to be, had better be borne than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."

Respectfully submitted,

A. C. LYON,

*Attorney for Plaintiffs in Error.*

November, 1912.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912

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No. 576.

P. L. ROGERS, PLAINTIFF IN ERROR,

v.

THE STATE OF ARKANSAS.

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No. 577.

L. P. BARNHILL, PLAINTIFF IN ERROR,

v.

THE STATE OF ARKANSAS.

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## BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

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The following assignments of error are presented in the above causes affirming the judgment of the Supreme Court of the State of Arkansas:

First. That said act was not void as applied to the business conducted by the appellant as being a regulation of interstate commerce in contravention of article 1, section 8, of the Constitution of the United States.

Second. That said act does not abridge the privileges and immunities of the citizens of the several States in contravention of article 4, section 2, of the Constitution of the United States.

Third. That said act does not deny to appellant and other persons within its jurisdiction the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States.

Fourth. That said act does not deprive citizens of life, liberty or property, without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

## BRIEF.

The first assignment involving article 1, section 8, of the Constitution of the United States, has been briefed in the following cases.

A. C. Crenshaw, Plaintiff in Error,
v. No. 127.
State of Arkansas, Defendant in Error.

and

E. L. Gannoway, Plaintiff in Error,
v. No. 128.
State of Arkansas, Defendant in Error.

This cause is submitted with the above cases and since all of them involve identically all the questions, we assume it needless repetition to discuss this question again in the cases covered by this brief, and will therefore address this brief to the second, third and fourth assignments of error made by the plaintiffs in error.

## PRIVILEGES AND IMMUNITIES.

The act neither in terms nor by fair implication can be confirmed to nonresidents of the State of Arkansas, but is applicable to all who engage in the occupation of peddling regardless of whether they are residents of the State or nonresidents thereof. The statute does not have the effect of discriminating against the citizens outside of the State.

The Supreme Court of the State of Arkansas in

*Ex parte Byles*, 93 Ark. on p. 620, stated:

"Counsel insist that the statute selects a few articles not manufactured in this State and imposes a prohibitive tax on the sale thereof, thus excluding foreign manufactured articles and preventing nonresident merchants from selling them here. Such is not, however, the effect of the statute, nor does it appear to be its design. We are not advised that none of these articles are manufactured in the State; but, even if there are none, this does not effect the validity of the statute. It bears alike on all persons peddling these articles, wherever manufactured, and it does not, either in letter or in spirit, discriminate against any. *Armour Packing Co. v. Lacy, supra.* Neither can we say that the tax or license fee of $200.00 per annum is prohibitive."

*Armour Packing Co. v. Lacy*, 200 U. S. 226.

*Machine Co. v. Gage*, 100 U. S. 676.

*Emert v. Missouri*, 156 U. S. 296.

*In re Watson*, 17 S. Dak. 468, s. c. 2 Am. & E. Ann. Cas. 321.

*State v. Webber*, 214 Mo. 272.

*Singer Mfg. Co. v. Wright*, 97 Ga. 114 s. c. 35 L. R. A. 497.

*State v. Montgomery*, 92 Me. 433.

*Hays v. Commission*, 107 Ky. 655.

*People v. Smith*, 147 Mich. 391.

*State v. Stevenson*, 109 N. C. 730.

*Exparte Haylman*, 92 Cal. 492.

In *Brown-Forman Co. v. Kentucky*, 217 U. S. l. c. 571-573, the court said:

"It has been urged that the tax is not imposed as a license upon the doing of business, but is laid upon the goods produced, and is therefore arbitrary and discriminatory, as one not imposed upon all other kinds of liquors, whether produced in or out of the State. This contention, if good, would only carry the case back to the underlying objection that the classification is arbitrary and unreasonable, and therefore void, as denying the equal protection of the law, a question which at last must be answered, whether the tax be an occupation or a property tax. But the Kentucky Court of Appeals has construed the act as not a property tax, but as one imposing a license or occupation tax upon the business. * * *

The payment of the tax at the times required by the statute is the condition upon which authority to continue in the business is made to depend. This is manifestly a tax on the business and not upon the property. The amount of the tax is simply regulated by the amount of the product, but it is a license tax upon the business. To hold otherwise would be to say that the Legislature can not impose a graduated license tax based upon the amount of product manufactured. Such a construction and interpretation of the stat-

ute here involved, by the highest court of the State, should be accepted as definitely determining that the tax complained of is not a property tax, but a license tax imposed upon the doing of a particular business plainly subject to the regulating power of the State."

In *Southwestern Oil Co. v. Texas*, 217 U. S. 1. c. 126, 127, this court said:

"What were the special reasons or motives inducing the State to adopt the classification of which the oil company complains we do not certainly know. Nor is it important that we should certainly know. It may be that the main purpose of the State was to encourage retail dealing in the particular articles mentioned in section 9. If the statute had its origin in such a view, we do not perceive that this court can deny the power of the State to proceed on that ground. We may repeat what was said in *Delaware Railroad Tax Cases*, 18 Wall. 206-231, that 'it is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the Legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction.' But we will not speculate as to the motives of the State, and will assume—the statute, either upon its face or by its necessary operation, not suggesting a contrary assumption—that the State has in good faith sought, by its legislation, to protect or promote the interests of its people. It is sufficient for the disposition of this case to say that, except as restrained by its own Constitution or by the Constitution of the United States, the State of Texas, by its Legislature, has full power to prescribe any system of taxation which, in its judgment, is best or necessary for its people and government; that,

so far as the power of the United States is concerned, the State has the right, by any rule it deems proper, to classify persons or businesses for the purposes of taxation, subject to the condition that such classification shall not be in violation of the Constitution of the United States; that the requirement by the State that *all* wholesale dealers in *specified articles* shall pay a tax of a given amount on their occupation, without exacting a similar tax on the occupations of wholesale dealers in *other* articles, can not, on the face of the statute or by reason of any facts within the judicial knowledge of the court, be held, within the meaning of the Fourteenth Amendment, to deprive the taxpayer of his property without due process of law or to deny him the equal protection of the laws; and that the Federal court can not interfere with the enforcement of the statute simply because it may disapprove its terms, or question the wisdom of its enactment, *or because it can not be sure as to the precise reasons inducing the State to enact it.*"

Whether the enactment of a statute is really adapted to bring about the result desired from its passage and calculated to promote the general welfare, are all matters with which the State court is familiar, but a like familiarity can not be ascribed to this court and this court in discussing the propotition in

*Welsh v. Swasey*, 214 U. S. l. c. 105, said:

"For such reason this court, in cases of this kind, feels the greatest reluctance in interfering with the well considered judgments of the courts of a State whose people are to be affected by the operation of the law. The highest court of the State in which statutes of the kind under consideration are passed is more familiar with the particular causes which led to their passage (although they may be of a public nature) and with the general situation sur-

rounding the subject-matter of the legislation than this court can possibly be."

In *McLean v. Arkansas*, 211 U. S. l. c. 547, the court again said:

"The Legislature being familiar with local conditions is primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the Legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. *Jacobson v. Massachusetts*, 197 U. S. 11; *Mugler v. Kan.*, 123 U. S. 623; *Minnesota v. Barber*, 136 U. S. 313, 320; *Atkins v. Kan.*, 191 U. S. 207-223."

"We can not say that there was no reason for exempting from its provisions mines so small as to be in the experimental or formative state and effecting but few men, and not requiring regulation in the interest of the public health, safety or welfare. We can not hold, therefore, that this law is so palpably in violation of the constitutional rights involved as to require us, in the exercise of the right of judicial review, to reverse the judgment of the Supreme Court of Arkansas, which has affirmed its validity."

In *Williams v. Arkansas*, 217 U. S. l. c. 90, it is said:

" 'When a State Legislature has declared in its opinion policy requires a certain measure, its action should not be disturbed by the court under the Fourteenth Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal fore its extension to others whom it leaves untouched.' *Missouri, Kansas & Texas Ry. Co. v. May*, 194 U. S. 267."

THE STATUTE IS NOT IN CONTRAVENTION OF THE

There is a wide difference in the occupation of those who vend their wares from their places of business to the public when the public call for the same in accordance with their own desires and necessities, and those who go about the country from door to door soliciting individual members of the public generally to purchase or to enter into contracts of purchase, the fulfillment of which is carried out later by still other individuals. The case is also different from that of the ordinary commercial traveler or drummer who sells to the dealer either by wholesale or retail. Many differences may be reasonably assumed. One who locates his business and conducts it at an established place may be more readily held to account for his tranactions, is easier reached by those deceived or misled by his artifice, if it be practiced, than one who plies his vocation in the rural districts in one section one day and in another remote, the next. Many reasons may occur to the mind why those who conduct their business in the ordinary way, whether they be residents or nonresidents, should be distinguished as a class from those who travel over the country from door to door among the people, away from the ordinary marts of trade and the publicity which surrounds such transactions and where every art which may be calculated to force the commodity upon the unwilling and reluctant purchaser, may be practiced with impunity. It certainly can not be said that such classification is clearly arbitrary and without any foundation in fact.

"A very wide discretion must be conceded to the legislative power of the State in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulator taxation through an excise or license tax. If the selection or

classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of differense or policy, there is no denial of the equal protection of the law."

*Brown-Forman Co. v. Kentucky,* 217 U. S. 563.

The same principle is elaborated by this court in the case of

*Southwestern Oil Co. v. Texas,* 217 U. S. 114 (l. c. 121), in which the court says:

"But it is contended that the statute contravenes the Fourteenth Amendment, in that it denies to the oil company the equal protection of the laws. This position is based mainly on the ground that the statute by imposing a tax on *wholesale* dealers in coal oil, naphtha, benzine, mineral oils refined from petroleum, and all other mineral oils, while omitting to put any such tax whatever on wholesale dealers in other articles of merchandise—such, for instance, as sugar, bacon, coal and iron—so discriminates against wholesale dealers in the several articles specified in section 9 as to deny them the equal protection of the laws. This view gives to the amendment a scope that could not have been contemplated at the time if its adoption. The tax in question is conceded to be an occupation tax simply. It was imposed under the authority of the State Constitution, providing that the Legislature may impose occupation taxes, both upon natural persons and occupations other than municipal, doing any business in the State, * * * except that persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax." It is not questioned that the State may classify occupations for purposes of taxation. In its discretion it may tax all, or it may tax one or some, taking care to accord to all *in the same class* equality of rights. The statute in respect of the particular class of wholesale dealers mentioned

in it is to be referred to the governmental power of the State, in its discretion, to classify occupations for purposes of taxation. The State, keeping within the limits of its own fundamental law, can adopt any system of taxation or any classification that it deems best by it for the common good and the maintenace of its government, provided such classification be not in violation of the Fourteenth Amendment.

A leading case on the general subject is *Bell's Gap Rd. Co. v. Pennsylvania,* 134 U. S. 232-237. In that case a question arose as to whether a statute of Pennsylvania, subjecting bonds and other securities issued by corporations, to a higher rate of taxation than was imposed on other moneyed securities, was a denial of the equal protection of the laws to corporations. The court held that there was no discrimination which the State was not competent to make, saying: "All corporate securities are subject to the same regulations. The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon trades and professions, and may vary the rate of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usages, are within the discretion of the State Legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations

against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impractiable and unwise to attempt to lay down any general rule or definition on the subject that would include all cases. They must be decided as they arise. We think that we are safe in saying that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require, which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every State, in one form or another, deems it expedient to adopt."

In *Home Ins. Co. v. New York,* 134 U. S. 594, involving the constitutional validity of a law taxing corporate franchises and business, the court held that the statute was not a denial of the equal protection of the laws. It said that the amendment "does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation, and another kind of property to a different rate—distinguishing between franchises, licenses and privileges, and visible and tangible property and between real and personal property. Nor does the amendment prohibit special legislation. Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be obtained by it. And when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under

similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected. Under the statute of New York all corporations, joint stock companies and associations of the same kind are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another *of the same class.*"

So, in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 562: "A tax may be imposed only upon certain callings and trades, for when the State exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if a State could not tax any property or calling, unless, at the same time, it taxed all property or all callings. Its discretion in such matters is very great and should be exercised solely with reference to the general welfare involved in the necessity of taxation for the support of the State. A State may in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States."

There are many other cases in which the court considered the meaning and scope of the constitutional guaranty of the equal protection of the laws. We will refer to a few of them.

In *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337, the court sustained, as not inconsistent with the equal protection clause of the Fourteenth Amendment, a Kentucky statute providing for the assessment of railroad property for purposes of taxation in a mode different from that prescribed as to ordinary real estate, or as to the property of corporations chartered for other purposes, such as

bridge, mining, street railway, manufacturing, gas and water companies. It said that "the rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents *of each class*, so that the law shall operate equally and uniformly upon all persons *in similar circumstances*. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the method and instrumentalities by which the value of their property is ascertained." In *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 294, which involved the constitutionality of an inheritance tax law, the court recognized the power of the State to "distinguish, select and classify objects of legislation" by laws which did not violate the settled usages and established practices of our Government. In American Sugar Refining Company *v. Louisiana*, 179 U. S. 89, a State enactment, imposing a license tax on the business of refining sugar and molasses, was held not to be a denial of the equal protection of the laws, because of the exemption from such tax of planters and farmers who ground and refined their own sugar and molasses. In *W. W. Cargill Company v. Minnesota*, 180 U. S. 452, a statute requiring a license to operate a warehouse for the receipt of grain, located upon the right-of-way of a railroad, but which did not require a license as to a similar warehouse not located on any right-of-way, was not a denial of the equal protection of the laws to the first-named class. In *Cook v. Marshall Co.*, 196 U. S. 268, which involves the validity of a cigarette tax law that made a distinction between jobbers and wholesale dealers in cigarettes, the court said: "There is a clear distinction in principle between persons engaged in selling cigarettes generally or at retail, and those engaged in selling by wholesale to customers without the State. They are two entirely distinct occupations. One sells at

retail and the other at wholesale, one to the public generally, and the other to a particular class; one within the State, the other without. From time out of mind it has been the custom of Congress to impose a special license tax upon wholesale dealers different from that imposed upon retail dealers. A like distinction is observed between brewers and rectifiers, wholesale and retail dealers in leaf tobacco and liquors, manufacturers of tobacco and manufacturers of cigars, as well as peddlers of tobacco. It may be difficult to distinguish these several classes in principle, but the power of Congress to make this discrimination has not, we believe, been questioned." In *Armour Packing Co. v. Lacy*, 200 U. S. 226, a State law, imposing a license tax on meat packing houses, did not deny the equal protection of the laws to persons or corporations engaged in such business, because a like tax was not imposed on persons engaged in the business of selling the products of such houses, or on those engaged in packing articles of food other than meat.

In our judgment, the objection that within the true meaning of the Fourteenth Amendment the statute of Texas has the effect to deny to the oil company the equal protection of the laws does not rest upon any solid basis. The statute makes no distinction among such wholesale dealers as handle *the particular articles specified* in section 9. The State had the right to classify such dealers *separately* from those who sold, by wholesale, other articles than those mentioned in that section. The statute puts the constituents of *each of those separate classes* on the same plane of equality. It is not arbitrary legislation, except in the sense that all legislation is arbitrary. If it be within the power of the Legislature to enact the statute, then arbitrariness can not be predicated of it in a court of law. And it can not be held to be beyond legislative power simply because of its classification of occupations." * * *

So far as the power of the United States is concerned, the State has the right, by any rule it deems proper, to classify persons or businesses for the purposes of taxation, subject to the condition that such classification shall not be in violation of the Constitution of the United States; that the requirement by the State, that *all* wholesale dealers in *specified articles* shall pay a tax of a given amount on their occupation, without exacting a similar tax on the occupations of wholesale dealers in *other articles*, can not, on the face of the statute or by reason of any facts within the judicial knowledge of the court be held, within the meaning of the Fourteenth Amendment."

It is no objection to a statute that a discrimination is made in favor of or against a given class so long as the discrimination is based upon a reasonable foundation in fact pertaining to the duties of the class as citizens or as taxpayers. As has been shown, whether such distinction really exists and whether such classification is based upon reasonable considerations, is largely within the discretion of the State Legislature. The segregation of a class of dealers who are itinerant and who go from house to house soliciting purchasers for their wares, whether by order or completing the transaction upon the spot, is certainly a different class of dealers from those who advertise and sell their goods in the ordinary way. Certainly the recognition of such a difference by the Legislature can not be said to be purely arbitrary and capricious. In *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, this court said:

"The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid. Of course, if such

discrimination were purely arbitrary, oppressive or capricious, and made to depend upon differences of color, race, nativity, religious opinions, political affiliations or other considerations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism and a denial of the equal protection of the laws to the less favored classes. But from time out of mind it has been the policy of this Government, not only to classify for purposes of taxation, but to exempt producers from the taxation of the methods employed by them to put their products upon the market." * * *

The Supreme Court of Missouri, in the case of *State v. Webber,* 214 Mo. 272, in 113 S. W. 1055, stated:

"The regulation of the business of itinerant peddlers is very ancient. Baron Graham, in *Attorney General v. Tongue,* 12 Price, 51, said: 'The object of the Legislature in passing the act upon which this information is founded was to protect, on the one hand, fair traders, particularly established shopkeepers, resident permanently in towns and other places, and paying rent and taxes there for local privileges, from the mischiefs of being undersold by itinerant persons, to their injury, and, on the other hand, to guard the public from the impositions practiced by such persons in the course of their dealings, who, having no known residence, carry on a trade by means of vending goods conveyed from place to place by horse or cart.'"

*Graffty v. Rushville,* 107 Ind. 502, 8 N. E. 609, 57 Am. Rep. 128.

*City of South Bend v. Martin*, 142 Ind. 31, 41 N. E. 315, 29 L. R. A. 531, 21 Amer. & Eng. Ency. Law (2 ed.) 791.

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